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INDERMAUR AND THWAITES'

PRINCIPLES AND PRACTICE

IN MATTERS OF, AND APPERTAINING TO,

CONVEYANCING.

INTENDED FOR THE USE OF STUDENTS AND THE PROFESSION.

THIRD EDITION

BY

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We have not wings, we cannot soar;
But we have feet to scale and climb
By slow degrees, by more and more,
The cloudy summits of our time.

* * * *

The heights by great men reached and kept,
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upward in the night.

Longfellow.

PREFACE TO THIRD EDITION.

THE object and design of this work are explained in a brief Introduction, but custom calls for a Preface.

The preparation of this edition has fallen to my lot, as did that of its forerunner. It has been my endeavour to keep the book up to date, to incorporate statute law and case law as seemed advisable, and throughout to aim at clearness and accuracy without verbosity. Each paragraph has been carefully revised, and where necessary rewritten. A good deal of new matter has been added, but the bulk of this edition has only been increased about 30 pages beyond that of the Second Edition.

The case law is brought down to the end of October last, some 270 new cases being quoted. The Housing and Town Planning, etc., Act 1909 (passed on the 3rd of December, 1909) contains two important sections (14 and 15), altering the law as regards implying in certain cases a warranty by the landlord that the premises let are, and shall continue, fit for human habitation, in certain contracts of tenancy made after 3rd December, 1909. This should be added to the bottom of page 404 of the text.

I venture to hope that the Principles and Practice of Conveyancing are set out in this edition in a manner which, without being either too elementary or too abstruse, will be found sufficiently full to prepare the student for a thorough examination on the subject.

CHARLES THWAITES.

22, CHANCERY LANE, LONDON,
January, 1910.

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Dart's Vendors and Purchasers	7th
Dickins' Requisitions on Title	2nd
Elphinstone's Interpretation of Deeds	1st
Encyclopædia of Forms and Precedents	1st
Encyclopædia of Laws of England	2nd
Foa's Landlord and Tenant	3rd
Gale on Easements	8th
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PRINCIPLES AND PRACTICE

IN MATTERS OF, AND APPERTAINING TO,

CONVEYANCING.

INTRODUCTION.

THE object of this work is to lay before students, in a concise and convenient form, matters appertaining to Conveyancing. It is unquestionably necessary that the principles relating to the subject should be mastered before practical details can be properly understood, and it is desirable, as far as possible, to blend and compare Real and Personal property. As regards principles, including therein the history of our law, it is assumed that the reader has some primary knowledge. Therefore many preliminary matters will be found dealt with only lightly, but it is hoped, nevertheless, in such a way as to bring all necessary matter before the reader, who, if he feels an insufficiency of knowledge on the subjects touched on, can study them more in detail from the various text books referred to, some one or more of which he will, probably, have previously read.

This work is not really intended as a first book for students, but as a second one, which will serve to remind them of their previous groundwork, to impress upon them the most practically important matters, and to lay before them many topics more in detail. It seems essential that students should firstly grasp principles before proceeding to practice,

though the one subject is necessarily connected with the other, and, as the practice of Conveyancing is considered, this must naturally be perceived by every thoughtful reader. No attempt is here made to divide principles from practice, as being separate subjects, but the book will be found to pass on, from chapter to chapter, in a way that will, it is hoped, be found intelligible and convenient. Still, the general idea is certainly to first deal mainly with principles and history, and then to pass on to the details of Conveyancing practice. This latter is a subject with which it is assumed the student is not so familiar as with principles, and, therefore, it will be found dealt with, in many respects, more in detail.

This book is intended as a companion volume to "Indermaur's Principles of Common Law"[1] and "Indermaur & Thwaites' Principles of Equity"[2]. Matters dealt with in those two works are, therefore, avoided as far as possible, and references given to them where, but for their existence, the matter would perhaps have required to be here dealt with more fully. By this means considerable useless repetition has been avoided, and valuable space saved. It is not an easy thing to comprise in one moderate sized volume all matter proper to be dealt with under the title of this book, but an attempt in that direction is made.

In considering the practical part of Conveyancing, a perusal of some of the ordinary precedents is of the greatest service, and this is strongly advised. Many students have access to some standard work on Conveyancing, such as "Prideaux's Precedents in Conveyancing," or "Key and Elphinstone's

[1] The 11th edition, by John Indermaur and Charles Thwaites, was published in 1908.

[2] The 6th edition was published in 1906.

Precedents in Conveyancing," or the "Encyclopædia of Forms and Precedents," and, if so, they can consider some of the precedents there given. To those, however, who have not access to some such work, a very small book of precedents is recommended, viz., Clark's "Student's Precedents in Conveyancing"[1]. Still a perusal of precedents, though advisable, is not absolutely essential.

Referring to the original assumption that this work will be taken up as a second book, it is submitted that it should be found, by itself, sufficient for the acquirement of the knowledge necessary for any reasonable examination on the subject with which it deals. That it can be usefully supplemented by the perusal of other works goes without saying. If there should be any who read this as a first book, it is hoped that it may still answer their purposes, but topics relating to principles and history of the law should then be looked up from some of the works referred to, where they are found but briefly touched upon here.

As regards cases, no attempt has been made to quote cases in support of every individual statement, but a most careful selection has been made of those authorities likely to prove of real use to students, and what are considered to be the most specially useful ones are given throughout in the margin of the text.

[1] Third edition published in 1905. (Sweet & Maxwell, Limited. Price 5s.)

CHAPTER I.

THE OWNERSHIP OF PROPERTY.

Real and personal property.

ALTHOUGH it is quite true that "the student must once and for all be warned against the danger of supposing that the technical terms of Land Law are trustworthy guides to its principles[1]"—a statement that may well be enlarged so as to comprehend law generally—yet it is useful as a starting point to divide property generally into two great classes, viz., (1) Real Property; (2) Personal Property. Their names originated from the kind of action that was brought in respect of wrong done to property. If a person was dispossessed of his land, he had a real action to recover it, but as regards a chattel he had only a personal action to recover damages. With regard, however, to leaseholds, this was not originally true, for the leaseholder was regarded merely as a bailiff of the land, and if he was ejected he had no right to recover back the land, but could merely bring an action for damages. Leaseholds, therefore, had not the essential qualification of real property, viz., the capability of restoration to the owner, and were classified as personal property, a classification which, technically, must still be observed, although at the present day a leaseholder has as complete a right to recover back his property as has the owner of any other estate in land. It is very necessary to observe throughout this division of property into real and personal.

Foundation of the idea of property.

In early times we naturally find more attention given to the laws relating to land than to those affecting other property. Occupancy may have been

[1] Jenks' Modern Land Law, 3.

the original foundation of the idea of property, and as might was too often right, possession no doubt was the great thing. As regards land it soon, however, became necessary to shew a title to it, which was not, and is not, the case with chattels personal. We do not ask a man to shew us his title to the goods he is selling us, but we do to the land we are purchasing. It was only natural that there should be the idea of absolute ownership as regards goods, but this idea never prevailed with regard to land since the feudal period, and we need not go further back than that. The feudal notion was an estate in land, and not an absolute ownership. It is so now. No man can be said to be the absolute owner of his land, but he has merely an estate therein. There is in England no such thing as *allodium* or absolute ownership in land, but all land is—at any rate theoretically—held of a superior, and the manner of holding is styled a tenure. In moveables it is different, for here a man may be, though he is not necessarily, an absolute owner.

Allodium.

We may lay down two rules: (1) There can be no absolute ownership of real property, but only estates therein; (2) There can be no estates in personal property—and proceed to consider the matter by way of enlarging upon and explaining these two rules.

Two rules.

1. *There can be no absolute ownership of real property, but only estates therein.*—If we go back to feudal times we find the notion of a superior granting to an inferior. Manors[1] owed their origin to the granting out by the sovereign of large tracts of land to be held of him, and the grantee in his turn granted out again. Everyone held of a superior, and his holding might be for different periods of duration.

1. No absolute ownership of real property.

[1] To this day, a manor comprises: (1) tenemental lands held by at least two freehold tenants in fee simple, holding by subinfeudation from the lord of the manor; and (2) demesne lands, *i.e.*, the manor house and grounds and the wastes, and (if any) the copyholds.

Different tenures.

The holding might also be in different ways or tenures, and these were mainly of three kinds, viz.: (1) Knight Service; (2) Socage; (3) Villenage. Knight Service was the chief military tenure of the feudal times (the others being grand serjeanty and cornage), and its principal incidents were personal and uncertain military service, fines, reliefs, aids, wardship, and marriage. Socage tenure was a free tenure in which a certain rent or an equivalent therefor was paid instead of the rendering of personal military service, and the rights in respect of wardship and marriage were very different. Villenage was an altogether inferior tenure, for the tenant held purely at the will of the lord, being sometimes bound to perform any services which the lord directed, when the tenure was styled *pure villenage*, and sometimes only bound to perform certain fixed services, when the tenure was styled *villein socage*. No doubt the importance of knight service tenure originally eclipsed the socage tenure, because the times were essentially military, and that was the true military tenure. Villenage occupied a natural place in the system, and to understand it it is necessary to look at the creation of a manor. The sovereign granted a tract of land to a great baron, usually with rights of jurisdiction and other sovereign rights or franchises within the territory by virtue of which it was constituted a manor. As to territory, a manor comprised: (1) demesne lands retained in the freehold possession of the lord, including the wastes over which the tenants had pasturage, and including (generally) lands held in villenage (now copyhold) tenure, and (2) tenemental lands held by subinfeudation by at least two freehold tenants in fee simple by services due to the lord, and of which the lord retained the seignory. As to jurisdiction, the manor comprised: (1) a court baron to deal with the tenemental lands, in which the freehold tenants were the judges, (2) a

Manors.

copyholder's court to deal with the villenage lands, in which the steward of the manor was judge, and (3) a court leet, exercising general criminal and administrative jurisdiction within the manor; the jurisdictions of the court baron and court leet are now entirely superseded, though the courts are still held. This system of tenures worked very well in the early feudal times. But the tenant in knight service soon became discontented with the obligation to perform personal services, as witness the frequent arrangement for a money payment ("escuage") instead; and the villein could not be supposed to have any natural content at all. The tenant in socage might well be content.

Escuage.

In course of time villenage ceased to exist—it became lost in custom. The lord, to encourage the villein, let it be known that if he did certain things he should not be dispossessed, although it was in the lord's power to dispossess him. Custom was thus established, and the man who originally was a servitor holding purely at will, soon came to consider that, if he acted according to custom, he was secure in his holding. This became at last an acknowledged fact, and although in *Pigg* v. *Cayley*[1] in James I.'s reign, an attempt was made to assert the original right of the lord, it was held that villenage existed no longer, and that the man who was originally a villein had become a copyholder. A copyholder, therefore, is a man who holds his lands technically at the will of the lord, but really according to the custom of the manor as evidenced by the court rolls. If a copyholder is not expressed to hold at the will of the lord, he is correctly said to be possessed of a customary freehold; but it has long been settled that he is only a privileged copyholder and that the freehold is in the lord of the manor[2].

Copyholds.

Pigg v. *Cayley*.

Customary freehold.

[1] (1617) Noy, 27.

[2] Scriven on Copyholds (1896), 14; *Portland* v. *Hill* (1866), 2 Eq., 765.

Abolition of knight service.

Villenage being thus converted into copyhold, we have next to notice the extinguishment of knight service tenure. Feudalism long before the reign of Charles II. had become practically a thing of the past; its incidents were burdensome, and accordingly the opportunity was seized at the restoration of that monarch to abolish it. This was done by 12 Car. II., c. 24, which statute did not, however, affect copyholds, nor the exceptional tenure of grand serjeanty. We are, therefore, from this period left with two strictly real property tenures, viz.: Socage (which is our modern freehold holding), and copyhold, but it must be remembered that there was, and is, also existing the derivative tenure of leasehold, which is strictly not real but personal property. Furthermore, we must notice that there are certain peculiar varieties of socage tenure, viz.: Gavelkind, Borough English, and Petit Serjeanty, and that as regards ecclesiastical holdings, there is also the ancient tenure of Frankalmoign[1]. Of these peculiar holdings the only ones here proposed to be further referred to are Gavelkind and Borough English.

12 Car. II., c. 24.

Present tenures.

Gavelkind.

Gavelkind is a socage tenure existing chiefly in the County of Kent, where all land is presumed to be of this tenure until the contrary is shewn. Its peculiar incidents are as follows: (1) An infant may convey at the age of fifteen by means of a feoffment, but in no other way[2]. (2) On intestacy the land

[1] The tenure of Divine Service was abolished by 12 Car. II., c. 24, sec. 1. Ancient demesne is a socage tenure in manors anciently belonging to the Crown; all its ancient privileges have disapppeared; the tenants are freeholders (*Marttens* v. *Hill* (1901), 1 Ch., 842; 72 L. J., Ch., 489).

[2] This right was recognised as still existing in *Re Maskell & Goldfinch's Contract* (1895), L. R., 2 Ch., 525; 64 L. J., Ch., 678; 72 L. T., 836, subject however to this, that it must be a fair and proper conveyance. It appears, therefore, that an infant cannot thus convey without valuable consideration. In this case, the feoffment was held not binding on the infant, because he was conveying a share in land, and it appeared that he had not received the proper proportion of the purchase money.

descends to all the males in the same degree equally[1]. (3) The husband gets curtesy out of half only of the lands, irrespective of the birth of issue, but only so long as he remains a widower. (4) The wife gets dower out of half of the lands, but only so long as she remains unmarried and chaste. There were formerly two other peculiarities, for a will could always be made of gavelkind lands, and there was no escheat for treason or felony.

Borough English. Borough English is also a socage tenure, and its great feature is that on the death of a tenant intestate leaving sons, the youngest inherits. This custom does not ordinarily extend to collateral heirs, whilst the custom as to descent in gavelkind does.

Summary. Summarising tenures at the present day we may say that they are three: (1) Freehold; (2) Copyhold; (3) Leasehold. In freehold tenures may be found the varieties of Gavelkind and Borough English, not infrequently the former, but certainly not often the latter. There may be still existing the further variation of Petit Serjeanty. Apart from these tenures, and unworthy of separate classification, may be mentioned Grand Serjeanty, and Frankalmoign.

The rule. But whatever the tenure may be, we come back to the truth of our rule, that there can be no absolute interest in land but only an estate. The freeholder may have an estate for life, an estate in tail, or an estate in fee simple. The copyholder may have analogous estates. The leaseholder can have but a definite term, and if he holds after that term has expired, he is said to be a tenant at sufferance. If a

[1] This rule extends to all collaterals, no matter how remote (*Re Chenoweth, Ward* v. *Dwelley* (1902), 2 Ch., 488; 71 L. J., Ch., 739; 86 L. T., 890). It was not affected by the Inheritance Act 1833 (*Muggleton* v. *Barnett* (1857), 2 H. & N., 653).

person enters upon land without any definite estate being granted to him, he is said to be a tenant at will. Land may be held under different tenures, but whatever the tenure may be the landowner has only an estate.

Modern incidents of tenure.

The modern incidents of the tenure of an estate in fee simple are an oath of fealty never exacted, a right of escheat seldom accruing, possibly a small quit rent and (if so) a relief on death, and suit of the manor court (if any)[1]; and if the tenure is copyhold, there are other incidents depending on the custom of the manor.

No estates in personal property.

2. *There can be no estates in personal property.*— This rule is technically true and practically untrue. The Common Law starts plainly enough with the idea of absolute ownership, and knowing nothing about estates, though even here an exception was soon established in the case of the bequest of a leasehold interest to one for life and then over, for this was allowed on the principle of giving effect to the testator's intention. Beyond this the Common Law was firm, so that where leasehold property was devised to a man and the heirs of his body, it was held that he was absolutely entitled to the property[2]. But this strict rule of the Common Law was very naturally not observed in the Court of Chancery, which did permit the gift of a chattel interest to one for life and then over; and if moveable goods were thus given, Chancery would compel the life owner to furnish and sign an inventory of the goods, and undertake to take proper care of them. With regard to this difference between Law and Equity, the student will remember that the rules of Equity now prevail[3]. But the Court of Chancery never

Executory bequest of leaseholds.

Leventhorpe v. Ashbie.

[1] Williams' Real Property, 55.
[2] *Leventhorpe* v. *Ashbie* (1635), Tudor's Conveyancing Cases, 382.
[3] Judicature Act 1873, sec. 25 (II).

went so far as to meddle with the rule laid down in *Leventhorpe* v. *Ashbie*, that words which confer an estate tail in real property confer an absolute ownership when applied to personalty. Furthermore, both at Law and in Equity, the rule has always been that a gift to persons in succession of articles *quæ ipso usu consumuntur* (*e.g.*, wines) vests the absolute interest in the first donee[1].

There may, to a certain extent, be interests in personalty analogous to estates in realty.

The truth, therefore, as regards personal property, including therein leaseholds, is that though there cannot technically be estates therein, yet that interests therein very analogous to estates may be created. A man may have a life interest in personalty, and another may be interested in remainder, or by way of executory limitation over. But there we stop, for a man can neither have a fee simple, nor an estate tail, in personalty. Words which would confer such an estate in real property confer the absolute ownership in personal property. With regard to all interests in personalty in any way analogous to estates in realty, they are generally effected through the instrumentality of trustees, and created either by settlement or by will.

All property may be held by one or by several.

With regard, however, both to real and to personal property, it is equally true to say that they may be held by one person or by several. There may be joint tenancy, or tenancy in common, either in realty or in personalty, and either may be held in partnership. Realty may also be held in co-parcenary, but not personalty.

We have, so far, glanced at the nature of ownership in realty and personalty; and having seen that there

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[1] Compare and distinguish *Re Colyer*, *Milliken* v. *Snelling* (1887), 55 L. T., 344.

can be but estates in land and no absolute interest therein, it will be convenient to now consider these different estates in the sense of their duration, and observe to some extent the position of the owners.

Different freehold estates.

All estates in land are either freehold or less than freehold. There are three freehold estates in land, viz., estates for life, estates in tail, and estates in fee simple.

1. Life estates.

The life estate is the smallest freehold interest in land, and this may be either for the tenant's own life, or for the life of another, in which case it is styled an estate *pur autre vie*. Estates for life, as regards the mode of creation, are either conventional (created by act of the party) or legal (created by operation of law), *e.g.*, Dower or Curtesy. The ordinary feudal grant was for the tenant's life, and to make his interest endure beyond his life express technical words were necessary, a rule which still holds good as regards grants, though not as regards devises[1]. Dower and Curtesy will be found dealt with in a subsequent chapter,[2] but a few words are necessary here as regards an estate *pur autre vie*.

Conventional and legal.

Estate *pur autre vie*.

An estate *pur autre vie* may arise: (1) by express grant to one person for another's life, or (2) by a tenant who holds for his own life assigning his life estate to another person. The owner of such an estate is called the tenant *pur autre vie*, and the person during whose life he holds is called the *cestui que vie*. If the tenant dies during the life of the *cestui que vie* the question arises, what becomes of the property during the residue of the *cestui que vie's* life? This depends on whether the tenant simply held

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[1] 1 Vict., c. 26, sec. 28.
[2] Chap. VIII., post, pp. 241-248.

without words of limitation, or with words of limitation. In the former case, *i.e.*, grant to A for the life of B, then at Common Law when A died any one might enter and hold the land for the residue of the *cestui qui vie's* life, and he was styled a general occupant. There is, however, now no such thing as a general occupancy, for, on the death of the tenant, the estate passes under his will, and if he dies intestate it passes to his personal representatives for the benefit of his next-of-kin[1]. Thus it always forms part of the deceased tenant's estate. If, however, the estate were limited to the tenant *pur autre vie* and his heirs, there was never any general occupancy, but the heir entered as special occupant; and, unless the owner disposes of it by will, this is so now subject to the Land Transfer Act 1897, under which it devolves in the first place on the legal personal representative as hereinafter explained. If the estate were limited to the tenant *pur autre vie* and the heirs of his body, then a *quasi entail* was said to be created, and under this the tenant was, as soon as he had issue born, in the same position as if the limitation had been to him and his heirs, *i.e.*, he could alienate by ordinary deed or will, such limitation not coming within the operation of the Statute De Donis[2].

General occupant.

Special occupant.

Quasi entail.

The three most important topics for consideration as regards the position of any tenant for life, are: (1) Waste; (2) Improvements; (3) Leases and sales. The first two only of these will be dealt with in this chapter, the remaining one being considered subsequently[3].

Waste means some injury to or alteration of the inheritance by a limited owner. It is some act

(1) Waste.

[1] 1 Vict., c. 26, secs. 2, 6, re-enacting similar provisions in sec. 12 of the Statute of Frauds (29 Car. II., c. 3).

[2] Jenks, 55.

[3] Post, pp. 167-186.

which either deteriorates the value of the land, or alters[1] its character, for the latter is waste though no harm is done, or perhaps the property even rendered more valuable. If this is the case, it is styled ameliorative waste[2]. With regard to the character of the waste, it is either voluntary or permissive, and with regard to the remedy, it may be legal or equitable. Voluntary waste consists of something active, *e.g.*, cutting down trees, opening mines, converting arable land into pasture. Permissive waste consists of the merely passive act of omitting to repair or do what is necessary to keep the property in a proper state.

An ordinary tenant for life must not commit any act of voluntary waste, subject to the following exceptions :—

Estovers.

1. He may take reasonable botes or estovers.

Honeywood v. *Honeywood.*

2. If the property consists of a timber estate, planted for the purpose of timber being cut periodically, then he is justified in cutting it when ripe, and may keep all the proceeds, provided he replants[3].

3. He may continue to work gravel pits or mines or quarries which have been worked previously[4].

Settled Land Act.

4. In the case of a settled estate, if a tenant for life is impeachable for waste in respect of timber, and there is on the land timber ripe and fit for cutting, and he can obtain the consent of the trustees or an order of Court, he may cut and sell the timber ; but

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[1] Where A leased to B for a reservoir, and B underlet to C for a rubbish shoot, and C's rubbish had raised the land 10 feet, A obtained an injunction and damages (*West Ham Charity Board* v. *East London Waterworks* (1900), 1 Ch., 624 ; 69 L. J., Ch., 257 ; 82 L. T., 85).

[2] See *Meux* v. *Cobley* (1892), 2 Ch., 253 ; 61 L. J., Ch., 449, where the lessee of a farm erected glass houses on arable land to grow tomatoes, etc., for market, and the lessor was refused an injunction.

[3] *Honeywood* v. *Honeywood* (1874), L. R., 18 Eq., 309 ; 43 L. J., Ch., 652 ; *Dashwood* v. *Magniac* (1891), 3 Ch., 306 ; 60 L. J., Ch., 809 ; 65 L. T., 811.

[4] *Chaytor* v. *Trotter* (1902), 87 L. T., 543.

three-fourths of the net proceeds of the sale must be set aside and invested as capital money, he only taking one-fourth as his own [1].

A tenant for life is not, however, liable for permissive waste, that is to say, he cannot be compelled to keep the property in repair [2]. The contrary is, of course, the case if the instrument conferring the life estate throws this obligation upon him [3]. *Re Cartwright.*

But though this is the natural legal position of a tenant for life, it is open to the creator of the life estate to expressly grant the estate to the tenant, "Without impeachment for waste," and when this is done, the Common Law allowed the tenant to commit whatever waste he pleased [4]. The Court of Chancery, however, held that, notwithstanding these words, the tenant must not commit any gross or excessive acts of waste, *e.g.*, pull down the mansion house, or cut down timber which had been planted in the nature of ornament. Here, therefore, we see the tenant not liable at Law, but nevertheless liable in Equity, and hence this was styled equitable waste. For the so-called legal waste there was a remedy at Law, for the so-called equitable waste there was only a remedy in Chancery. The Judicature Act 1873 did away with this distinction; so that an action may now be brought either in the King's Bench or the Chancery Division in respect of any waste for which the tenant is liable [5]. The proper remedy is an action for damages if the waste has

Lewis Bowles' Case.

Equitable waste.

Judicature Act 1873, sec. 25 (3).

[1] Settled Land Act 1882 (45 & 46 Vict., c. 38), sec. 35.

[2] *Re Cartwright, Avis* v. *Newman* (1889), 41 Ch. D., 532; 58 L. J., Ch., 590; 60 L. T., 891. And this rule applies to leaseholds, *i.e.*, the estate of the life tenant is not liable to the remainderman for breaches of the covenant to repair (*Re Parry* (1900), 1 Ch., 160; 69 L. J., Ch., 190; 81 L. T., 107.)

[3] *Woodhouse* v. *Walker* (1880), 5 Q.B.D., 404; 49 L. J., Q.B., 609.

[4] *Lewis Bowles' Case* (1616), Tudor's Conveyancing Cases, 86.

[5] 36 & 37 Vict., c. 66, sec. 25 (3).

been committed, and an action for an injunction to prevent its commission if it is only threatened; or the two claims may be combined. If a tenant is liable for permissive waste, the proper remedy is always an action for damages.

Repair of settled leaseholds.

A tenant for life of leaseholds settled by will is not liable for the cost of repairs rendered necessary by breaches of covenant in the testator's lifetime, and such repairs must be defrayed out of corpus [1], unless the will says otherwise [2]. But the tenant for life is bound during his estate to pay the rent and perform the covenants [3], and to keep down the interest of a mortgage on the leaseholds [4].

Renewal of settled leaseholds.

The expenses of renewing settled leaseholds (whether for years or for lives) are borne by the tenant for life and remainderman in proportion to their actual enjoyment of the renewed lease and not in proportion to their probable enjoyment as estimated by actuarial valuation [5]. If the tenant for life die during the original term, all expenses of the renewal fall on capital [6], and if the tenant for life outlives the renewed period they fall on income [7].

(2) Improvements.

A tenant for life, having such a limited interest in the land, is naturally not often ready to spend his own money in improving the property. Unless,

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[1] *Re Courtier* (1886), 34 Ch. D., 136; 56 L. J., Ch., 350; 55 L. T., 574; *Betty* v. *A. G.* (1899), 1 Ch., 821; 68 L. J., Ch., 435; 80 L. T., 675.

[2] *Re Redding*, *Thompson* v. *Redding* (1897), 1 Ch., 876; 66 L. J., Ch., 960; 76 L. T., 339.

[3] *Betty* v. *A. G.*, supra; *Re Thomas*, *Wetherill* v. *Thomas* (1900), 1 Ch., 319; 69 L. J., Ch., 198.

[4] *Re Gjers*, *Cooper* v. *Gjers* (1899), 2 Ch., 59; 68 L. J., Ch., 442; 80 L. T., 689.

[5] *Rawe* v. *Chichester* (1773), Amb., 715; *Cridland* v. *Luxton* (1834), 4 L. J., Ch., 65. Both in *Re Baring* (1893), 1 Ch., 61, and *Reeves* v. *Creswick* (1839), 3 Y. & C., 715, actuarial valuations were used.

[6] *Isaac* v. *Wall* (1877), 6 Ch. D., 706.

[7] *Lawrance* v. *Maggs* (1759), 1 Eden., 453.

therefore, some arrangement could be made with the remainderman, considerable injury might be done to the property, or at any rate it might not be kept in the condition that it ought to be. But the Settled Land Act 1882 contains a valuable provision for the tenant for life's assistance, as it expressly allows "capital money" to be invested in making any of 20 or more specified improvements, *e.g.*, draining, warping, irrigation, roads, cottages, farm buildings, water supply, tramways, sinking trial pits for mines, reasonable additions or alterations to enable buildings to be let, and rebuilding the mansion if not more than half the rental of the estate is spent[1]. The first enquiry of a tenant for life, therefore, who desires to make any authorised improvement, should be whether there is any capital money in the hands of the trustees, and, if there is not, it may be wise to sell a portion of the property, so as to produce some capital money. If there is capital money, the tenant for life may submit a scheme for approval to the trustees of the settlement, or the Court, shewing the proposed expenditure[2]. It is then the duty of the trustees to consider: (1) if the scheme is for the benefit of the settled land, (2) if it is a proper scheme, and (3) if the improvements are within the Act[3]. If the trustees will not approve the scheme, the tenant may appeal to the Court[4]. The scheme being approved, the improvement may then be proceeded with, and the necessary amount may be paid by the trustees on production of: (1) a certificate of the Land Department of the Board of Agriculture and Fisheries[5] that the work is properly executed, or (2) a like certificate of a

Settled Land Act 1882.

Re Egmont.

[1] Settled Land Act 1882, secs. 24, 25; Settled Land Act 1890 (53 & 54 Vict., c. 69), sec. 13.

[2] Settled Land Act 1882, sec. 26.

[3] *Re Egmont, Lefroy* v. *Egmont* (1906), 2 Ch., 151; 75 L. J., Ch., 649; 95 L. T., 187.

[4] Settled Land Act 1882, sec. 44.

[5] 52 & 53 Vict., c. 30; 3 Edw. VII., c. 31.

competent engineer or practical surveyor, nominated by the trustees and approved by the Department, or (3) an order of the Court. If, however, the capital money is not in the trustees' hands, but is in Court, then in all cases the scheme must be approved by the Court, and the money paid on an order of the Court[1]. In this way, though the capital money is spent, yet it is really an investment in the sense of the increased value of the land. If a scheme has not been submitted and approved as above mentioned before the improvement was carried out, the Court may, if it thinks proper, make an order approving of the payment for the improvement[2]. This is, however, a matter in the Court's discretion, and in all cases a scheme should be submitted and approved before any outlay is made. A scheme may be approved in anticipation, although there is, at the time, no capital money available[3].

But if there is not, and is not likely to be, any capital money available, the Settled Land Act 1882 affords no help, and it is then necessary to fall back on certain other enactments, the chief of which is the Improvement of Land Act 1864[4]. Under this statute a tenant for life is permitted, with the sanction of an order of the Board of Agriculture, to borrow money for all the improvements authorized by the Settled Land Acts[5] and charge the same upon the inheritance, thus creating a land charge, in such a way as to pay off the loan and interest by instalments extending over a limited period not exceeding 40 years[6]. If the tenant dies before all

Improvement of Land Act 1864.

[1] Settled Land Act 1882, sec. 26.
[2] Settled Land Act 1890, sec. 15.
[3] *Re Duke of Norfolk's Estates* (1900), 69 L. J., Ch., 244; 82 L. T., 613; 48 W. R., 328.
[4] 27 & 28 Vict., c. 114; extended by 33 & 34 Vict., c. 56; 34 & 35 Vict., c. 84; 40 & 41 Vict., c. 31; 62 & 63 Vict., c. 46.
[5] Settled Land Act 1882, sec. 30.
[6] 62 & 63 Vict., c. 46, sec. 1.

the instalments are paid, then his estate is under no liability for the remaining instalments, but the settled property itself is liable in the hands of the next owner. Where a land charge has thus been created, and capital money afterwards comes into the hands of the trustees, the Settled Land Act 1887 permits such money to be applied in redeeming the land charge[1].

Settled Land Act 1887.

Another matter that ought to be referred to in connection with the position of a tenant for life is the right to emblements, *i.e.*, those fruits of the earth which are the result of the tenant's industry and come to maturity within a year. A life tenant has an uncertain estate, for death may at any moment determine his interest, and the rule is *Actus Dei nemini facit injuriam*; a rule which applies not only to a tenant holding for his own life, but also to a tenant *pur autre vie*. But the essence of the rule is that the determination of the estate is through an event which the tenant could not control, so that if the estate is determined by forfeiture—*e.g.*, if the estate is limited to a woman during widowhood, and she marries again before harvest, there is no right to emblements.

Emblements.

If a tenant for life sub-lets his land, and dies during the tenancy, then—unless the lease is binding on the next owner (as it will be if it is a proper lease under the provisions of the Settled Land Act 1882)—the sub-tenant who thus finds his tenancy suddenly put an end to, can claim emblements. But if the tenancy is one at a rack rent, then, instead of having emblements, the tenant holds on till the expiration of the current year of his tenancy, paying the proportionate part of the rent to the person next

Tenant holding from a tenant for life.

Emblements Act 1851.

[1] 50 & 51 Vict., c. 30.

interested after the death of the life tenant[1]. If the lease is binding on the person next interested, no claim for emblements arises, but the tenancy goes on, the rent being duly apportioned under the provisions of the Apportionment Act 1870, which treats all rents, annuities, dividends, and other periodical payments (except premiums on insurances) as accruing from day to day, and apportionable accordingly[2]. The apportioned part is not recoverable until the next full payment would fall due; and in the case of a continuing tenancy of land, the whole quarter's or half-year's rent, as the case may be, is to be recovered by the person next interested, and he is liable to the personal representatives of the deceased tenant for life for the proportionate part to which they are entitled[3].

Apportionment Act 1870.

2. Fee simple estates.

The typical feudal estate in land was certainly the life estate, but in course of time an estate of longer duration was recognized, viz., the fee simple estate. To confer this estate by conveyance *inter vivos*, the word "heirs" was always necessary as the essential word of limitation. That is not quite the case now, as either "to A and his heirs" or "to A in fee simple" may be used in a deed[4]; but one of these expressions must be used, as a grant "to A in fee" only passes a life estate[5]. As regards a will, any words of intention were always held sufficient; and the Wills Act 1837 now provides that a devise without words

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[1] 14 & 15 Vict., c. 25, sec. 1; *Haines* v. *Welch* (1868), 38 L. J., C. P., 118.

[2] 33 & 34 Vict., c. 35, secs. 2, 5, 6. If trustees sell stock cum dividend, after a tenant for life's death, for division among the remaindermen, this Act does not apply, and the tenant for life's estate is not entitled to any sum in respect of the dividend accruing at his death (*Bulkeley* v. *Stephens* (1896), 2 Ch., 241; 65 L. J., Ch., 597; 74 L. T., 409).

[3] 33 & 34 Vict., c. 35, secs. 3, 4.

[4] Conveyancing Act 1881 (44 & 45 Vict., c. 41), sec. 51.

[5] *Re Ethel and Mitchell & Butler's Contract* (1901), 1 Ch., 945; 70 L. J., Ch., 498; 84 L. T., 459.

of limitation, *e.g.*, to A B, shall pass the fee simple or other the whole estate which the testator had to dispose of, unless a contrary intention appears in the will[1], so that there is now no need to look for an intention to pass the fee simple as was formerly the case. A fee simple estate might be: (1) Absolute, *e.g.*, simply to A and his heirs; (2) Conditional, *e.g.*, to A and the heirs of his body; (3) Qualified, *e.g.*, to A and his heirs whilst they remain tenants of a certain manor.

Fee simple absolute.

The owner of a fee simple absolute has, technically, only an estate in the land, yet for all practical purposes at the present day he is absolute owner, for he can sell and deal with the property as he pleases, provided only that in so doing he does not injure another, for the rule is *Sic utere tuo ut alienum non lædas*[2]. And any condition in general restraint of alienation, annexed to the gift of a fee simple in realty or of the absolute ownership of personalty, is simply void[3]. But a tenant in fee simple, with an executory limitation over to some other person, is not allowed to commit equitable waste[4].

Sic utere tuo ut alienum non lædas.

Fee simple qualified.

A fee simple qualified is rarely met with, and the best example of it is found in the case of a base fee, that is the estate created by a tenant in tail in remainder when he bars the entail without the protector's consent[5]. Other examples would be to

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[1] 1 Vict., c. 26, sec. 28.

[2] Indermaur's Common Law, 352.

[3] See *Bradley* v. *Peixoto* (1797), Tudor, 514. Thus, where land was devised to A and his heirs with a gift over if A should mortgage or sell any part of it, the gift over was held void as repugnant to the nature of a fee simple (*Corbett* v. *Corbett* (1888), 14 P. D., 7; 58 L. J., P., 17). So where realty was devised to A, his heirs and assigns, with a proviso that if A became bankrupt the realty should then go to A's children, the proviso was held void for repugnancy, and A took a fee simple absolute (*Re Machu* (1882), 21 Ch. D., 838).

[4] *Turner* v. *Wright* (1860), 2 De G., F. & J., 234.

[5] Post, pp. 162, 163.

A and his heirs, tenants of the manor of Dale, or peers of the realm, or so long as X has heirs of his body, or so long as a certain tree or building stands or a certain river flows. It is essential that the estate *may* last for ever.

Fee simple conditional.

A fee simple conditional comprises every fee simple granted upon a condition, which condition may be either precedent or subsequent. But what was at Common Law mainly known as a fee simple conditional was the estate limited to a person and the heirs of his body, which, curiously enough, was held to be a gift upon condition that it should revert to the donor if the donee had no heirs of his body[1]. This, however, has long ceased to be the case, for such words now create an estate tail.

3. Estates tail.

An estate tail is an estate limited to a man and the heirs of his body, either generally or specially, *e.g.*, to A and the heirs of his body by Mary his wife; and further the limitation may be to male or to female heirs of the body. So that we here have four kinds of estates tail: (1) Tail general; (2) Tail special; (3) Tail male; (4) Tail female. To create such an estate by instrument *inter vivos*, the technical words "heirs of the body" were formerly essential, but now either those words may be used or the words "in tail"[2]. In the case of a will, any words sufficiently shewing the intention will do, *e.g.*, to A and his issue, or to A and his descendants. But as to a will the rule in *Wild's Case* must not be forgotten. This case decides that where there is a devise to a person and his children or issue, and he has no issue at the date when the will is made, then such person takes an estate tail; but if he has issue at the date when the will is made, he and his children

Wild's Case.

[1] 1 Stephen's Commentaries, 149, 150.
[2] Conveyancing Act 1881, sec. 51.

(living at testator's death) are joint tenants in fee simple [1].

De Donis.

The change in the effect of a limitation to a person and the heirs of his body was brought about by the Statute *De Donis* [2]. The reason for the passing of this statute was the dissatisfaction of the chief lords with the Common Law decision that the words created a fee simple conditional. It enacted that on all grants to a person and the heirs of his body, the will of the donor should be observed *secundum formam in cartâ doni expressam.* The object was to make the estate descend to lineal issue, and on failure of such issue to revert to the lord. We shall hereafter see how ineffectual this statute ultimately proved, and how a tenant in tail can now bar his entail and convert his estate into a fee simple absolute [3]. Whilst, however, the estate remains entailed, there is no complete power of alienation, though the ordinary tenant in tail is allowed to commit any act of waste that he pleases, even equitable waste.

Tenant in tail after possibility of issue extinct.

Where an estate is limited in special tail, and the woman from whose body the issue are to come dies without issue, the tenant is then said to be possessed of an estate tail after possibility of issue extinct. This is the only way in which such an estate can arise, and it should be observed that it possesses two peculiarities: (1) the tenant cannot bar the entail, (2) though permitted to commit ordinary acts of waste, he will be restrained from committing equitable waste [4].

Copyholds.

Turning now to copyholds, it is necessary to observe

[1] *Wild's Case* (1599), Tudor's Conveyancing Cases, 361. See Indermaur's Conveyancing and Equity Cases, 37, 38.
[2] 13 Edw. I., c. 1.
[3] Post, pp. 162, 163.
[4] *Lewis Bowles' Case* (1616), Tudor's Conveyancing Cases, 86.

that customary estates may exist in them, analogous to those which exist in freeholds. There may be a customary fee simple; or a customary estate for life or lives or for years, with a right to obtain a renewal as the lives fall in or years expire; or, by special custom, an estate tail. The statute *De Donis*, however, does not apply to copyholds, and consequently the effect of a conveyance of copyholds "to A and the heirs of his body" depends upon custom. If from time immemorial there has been a custom in the manor to entail, A gets a customary estate tail. But if there is no such custom, then by the Common Law effect of the words "heirs of the body," A gets a customary estate analogous to the old fee simple conditional. No copyholder can commit waste of any kind [1], except when warranted by custom; and if he does commit waste his estate is forfeited to the lord, and no Court has power to relieve against the consequence of such forfeiture [2]. The origin of copyholds has already been referred to [3], and it should also be noticed that a copyholder may be liable to pay a quit rent and a fine, and to yield a heriot either by way of heriot custom or heriot service. In fact, in copyholds everything depends on the customs of the individual manor. Furthermore, the freehold is in the lord of the manor, who, therefore, has vested in him the right to timber and minerals, though he cannot enter on the surface to take either without the copyholder's consent. Copyhold is an inconvenient tenure at the present day, and it is often very desirable to extinguish it. This may be done by enfranchising.

Fee tail in copyholds.

Enfranchisement.

It has always been open to the lord of a manor and his copyhold tenant to come to an agreement whereby the lands are enfranchised—this is styled a

[1] *Blackmore* v. *White* (1899), 1 Q. B., 293; 68 L. J., Q. B., 180.
[2] *Peachey* v. *Duke of Somerset* (1824), 2 Wh. & Tu., 250.
[3] Ante, p. 7.

voluntary enfranchisement. But the difficulty has often been to get the lord to agree, or if he would agree, to get him to accept reasonable terms. Statutory provisions have, therefore, been made both as regards voluntary and compulsory enfranchisement, and at the present day either lord or tenant has a right to compel enfranchisement. The Act now mainly governing the subject is the Copyhold Act 1894[1]. For the purpose of giving a cursory view of the statutory provisions on this subject we quote the following passage from a recent work on Modern Land Law[2]:—

Jenks' Modern Land Law.

"The provisions of these statutes are too long and complicated to be set out here; but broadly speaking they enable either lord or tenant, whether having limited interests or not, with the approval of the Board of Agriculture, to effect an enfranchisement, which will bind all future owners. If the enfranchisement be by mutual agreement, considerable latitude is given to the parties to fix the terms of compensation to be paid for loss of manorial rights. If it be effected at the instance of the copyholder, and the amount be small, the compensation takes the form of a gross sum of money paid to the lord or into Court, to devolve along with the manor; if, at the instance of the lord, or if the compensation to be paid exceeds one year's improved value of the land, it assumes the shape of an annual rent-charge equivalent to interest at 4 per cent. on the amount of the compensation. There are elaborate provisions for fixing the amount of the compensation in case the parties cannot agree. Certain useful sections enable the Board of Agriculture to refuse to allow proceedings for compulsory enfranchisement to continue if, in its opinion, substantial injustice

[1] 57 & 58 Vict., c. 46.
[2] Jenks, 65, 66.

would result from enfranchisement, and to enable the lord to buy out the tenant's interest as an alternative to enfranchisement in certain cases.

"In respect of enfranchisements effected under the Copyhold Act, whether voluntary or compulsory, it is provided that the enfranchised tenement shall be held free from all peculiar manorial customs, from every incumbrance affecting the manor, and from all claims by the lord, except the claim to escheats and the claim to minerals, and the franchise of fairs, markets, and sporting. But minerals and sporting rights may be made the subject of special agreement. On the other hand, the copyholder's rights of common in respect of his tenement are expressly reserved. It is interesting to note that although as a general rule the enfranchised tenement will be held subject to precisely the same interests and limitations as the copyhold which it has succeeded, yet that an enfranchisement effected by a tenant in tail in possession will give him a fee simple. The enfranchisement provisions of the Copyhold Act 1894 apply not only to copyholds, but to the commutation of all manorial incidents affecting land of any tenure."

Having now dealt with the different estates in freeholds, and glanced at the analogous estates in copyholds, and the position of the lord and the copyholder, it is necessary to refer to estates derived out of freehold land but not in themselves either freehold or copyhold. These are estates at will, estates at sufferance, and leaseholds, all of which have been already incidentally referred to.

Tenancies at will.

An estate at will may be created by express grant or agreement, or by operation of law, as where a person enters into possession of the land of another by his permission, but with no binding agreement

as to his holding. It is evident that such a tenant has really an occupation and nothing more, he has nothing that he can assign or dispose of, and no certainty of tenure. He may quit at his own pleasure, and may equally be evicted at his landlord's pleasure. Yet if he sows the land, and then his landlord determines his tenancy, he has a right to emblements[1]. He is not bound to keep the property in repair, but he is liable for voluntary waste; and he cannot assign.

Tenancies at sufferance.

A tenancy at sufferance occurs where a tenant having come into possession under a lawful title holds on after that title has expired. His position is much the same as that of a tenant at will, subject to this, that if he were a tenant for years, or from year to year, he will continue to be bound by the terms of his previous holding, so far as such terms can fairly be deemed to be applicable. A tenant at sufferance is not a trespasser, because he originally entered under a lawful title, but he will become one after demand of possession has been made.

Richardson v. *Langridge.*

Both these tenancies are eminently unsatisfactory, and the law therefore disfavours them, and will always when possible construe the tenancy to be from year to year. This it is able to do when rent is paid either yearly, half-yearly, or quarterly[2]. If this is the case, the rent can be distrained for; but if not, then the only remedy, if any, is an action for "use and occupation."

Leaseholds.

A leasehold interest or estate in land may be for a fixed period of years, or merely from year to year.

In the former case the tenancy naturally determines

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[1] As to which, see ante, p. 19.
[2] *Richardson* v. *Langridge* (1811), Tudor's Conveyancing Cases, 4.

at the expiration of the term; but in the latter case the tenancy runs on until determined (subject to contrary agreement) by half a year's notice to quit—or in the case of an agricultural holding a year's notice[1]—expiring at the end of the current year of the tenancy. The tenant must not commit any act of voluntary waste, but he is probably not liable for permissive waste, subject to this, that he must keep the premises wind and water tight[2]. Express agreement, however, usually governs these matters. Where a leasehold interest is granted, the tenant has strictly no legal interest until he enters (unless indeed the lease operates under the Statute of Uses), but he has merely what is styled an *interesse termini*, which is, however, more a technical than a practical distinction. An *interesse termini* will support an action against the lessor for not giving possession, but not an action for trespass or on a covenant for quiet enjoyment[3]. The tenant has in substance but the use of the property, and, therefore, by the old Common Law, anything which he affixed to the premises became part of them and belonged to the freeholder, but at the present day this is otherwise as regards fixtures erected for the purposes of trade, ornament, domestic use, or agriculture[4]. Leaseholds are usually held at a rent, which is sometimes of a nominal or "peppercorn" nature. The direct remedy to recover rent is by distress[5].

Interesse termini.

Fixtures.

Indermaur's Common Law, 69-73.

Ibid., 73-82.

Who may own property.

Every person is capable of owning personal property, and generally also this is true of real property, but this statement must be taken subject to the following remarks:—

[1] 8 Edw. VII., c. 28, sec. 22, replacing 46 & 47 Vict., c. 61, sec. 33.

[2] But see *Yellowly* v. *Gower* (1855), 11 Ex. at p. 294; *Davies* v. *Davies* (1888), 57 L. J., Ch., 1093.

[3] *Wallis* v. *Hands* (1893), 2 Ch., 75; 62 L. J., Ch., 586; 68 L. T., 428.

[4] See as to fixtures, Indermaur's Common Law, 69-73; also post, Chap. XIII.

[5] Ibid., 73-82. See further as to leases, post, Chap. XIII.

Corporation.

1. A corporation cannot hold land unless authorized to do so by licence from the Crown, its Charter, or by Act of Parliament, *e.g.*, joint stock companies. As to the last, it is provided that a company formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of gain by the company or by its individual members, cannot without the licence of the Board of Trade hold more than two acres[1]. It may be observed that as a corporation can have no heirs, it is useless, for the purpose of creating a fee simple estate, to make the grant to the corporation and its heirs. If it is a corporation aggregate, the fee simple will pass without any words of limitation, but if it is a corporation sole, it appears that it is necessary to make the grant to the corporation and "successors"[2].

Aliens.

2. Aliens could not formerly hold land, but now by the Naturalisation Act 1870[3], they may hold all property except a British ship or a share therein[4], and have all rights except the right to any office or franchise.

Cujus est solum, &c.

Finally it may be noticed that a person who has an estate in land has generally also the same estate or interest in the houses on the land, or the minerals beneath, for the rule is *Cujus est solum ejus est usque ad cœlum et ad inferos.* However, as already pointed out, in the case of copyholds, the right to the minerals is in the lord, and certain limited owners

[1] 8 Edw. VII., c. 69, sec. 19, replacing 25 & 26 Vict., c. 89, sec. 21.
[2] Goodeve's Real Property, 35.
[3] 33 & 34 Vict., c. 14, sec. 2.
[4] As to the ownership of British ships, it may here be noticed that the property in a ship is divided into 64 shares. There cannot be more than 64 individual owners, and no one can be registered as the owner of a part of a share, but five persons or less may be registered as joint owners, and these are deemed to constitute one person only. All owners of ships or shares therein are registered, and any registered owner may hold upon trust for any number of beneficiaries, but the trust does not appear on the register. See 57 & 58 Vict., c. 60 (Merchant Shipping Act 1894).

are prevented from committing waste. Land, however, may be granted apart from the minerals beneath, or the minerals apart from the land; and in a grant to a railway company purchasing land under the provisions of the Railways Clauses Act 1845 [1], the minerals are deemed to be excepted and reserved, unless expressly mentioned. When the owner wants to work such excepted minerals, he gives notice to the company, which within 30 days can elect to pay compensation for their being left unworked [2]; and the true measure of such compensation is in all cases the full net value of the minerals [3].

We have now in this chapter glanced at the ownership of property generally, and the different tenures, estates, and interests therein. We have, however, only so far regarded one person as being interested, and it will be convenient in our next chapter to consider united interests, which we will do under the title of "joint ownership."

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[1] 8 & 9 Vict., c. 20, sec. 77.
[2] Ibid., sec. 78.
[3] *Eden* v. *N. E. Ry. Co.* (1907), A. C., 400; 76 L. J., K. B., 940; 97 L. T., 254.

CHAPTER II.

JOINT OWNERSHIP.

Different kinds of joint ownership.

One person may be solely interested in either real or personal property, or several may together be interested. The different kinds of ownership by two or more, as applied without distinction to the kind of property are: (1) Joint tenancy; (2) Tenancy in common; (3) Co-parcenary; (4) Partnership. We have now, therefore, to consider estates or interests in property where two or more persons are concerned.

1. Joint tenancy.

Joint tenancy is a tenancy or interest in property arising by express grant or gift, or by express or implied agreement between the parties. It consists of an ownership given to two or more persons without words of severance, *e.g.*, a grant to A and B. Its distinguishing features are: (1) Unity of possession; (2) Unity of interest; (3) Unity of title; and (4) Unity of time of commencement of such title. But unity of time is not necessary if the joint tenancy is created by a limitation under the Statute of Uses or by a will[1]. A *jus accrescendi* or right of survivorship is always incident to a joint tenancy, *i.e.*, on the death of one joint tenant without having severed the tenancy, the whole estate or interest survives to the other or others.

Property may be expressly given to persons "as joint tenants," and that removes any question of doubt as to the character of the holding. But though no such express words are used, it is

[1] Tudor's Conveyancing Cases, 269.

the rule that if property is given to two or more persons without any words to shew that there are distinct interests conferred, then they are joint tenants[1]. If personal property be given to A and B simply, they are joint tenants, each having an equal interest, and the survivor taking the property absolutely. If land is granted to A and B simply, they are joint tenants for life, the survivor taking the whole for his life; if it is granted to A and B and their heirs, then they are joint tenants in fee simple, the survivor getting the entire fee simple; but if the grant is to A and B and the heirs of their bodies, they take an estate in special tail if they might lawfully intermarry, but if that is not the case they have an estate for life as joint tenants, with a remainder to them as tenants in common in tail[2]. Each joint tenant is seised of or entitled to the whole property, their interest being said to be *per tout et per mie*, that is to say, you cannot point to any particular portion of the property belonging to one more than the other, and yet each has an individual interest that he can alienate.

Tenancy by entireties.

There was, however, until lately, one peculiar species of joint tenancy, or ownership in the nature of a joint tenancy, that cannot any longer exist unless, indeed, the grant or gift was made before 1883, viz., a tenancy by entireties. It occurred where land was given to A and B, who happened to be husband and wife. They were not ordinary joint tenants, because of the principle that a wife was not a being distinct from her husband, and they were accordingly, in a half-hearted way, said to be seised of the property *per tout et non per mie*, that is to say, they each had an interest in the whole, but no separate or individual interest; they had both to join in a

[1] *Morley* v. *Bird* (1798), Tudor's Conveyancing Cases, 263.
[2] Co. Litt., 182.

disposition of the property, or else run the chance of losing or taking the whole by survivorship[1]. The Married Women's Property Act 1882[2] has altered this by providing in effect that a wife is to hold property as a distinct being, and, therefore, now under a grant to A and B, even though they are husband and wife, they are ordinary joint tenants[3]. It may further be noticed as arising out of the principle that husband and wife were in the eyes of the law deemed as one person, that if land were granted to A and B and C, and A and B happened to be husband and wife, they took one-half between them, and C the other half. It has been held that this is so still, notwithstanding the Married Women's Property Act 1882, on the ground that the Act was intended to give the wife larger rights against her husband but was not meant to prejudice the rights of third parties[4]. The only difference here, therefore, that the Act has made is, that whereas A and B formerly would have taken their half as tenants by entireties, now they take it as ordinary joint tenants *inter se*. The point is that C's share is not decreased from a half to a third[5].

Re March.

Jupp v. *Buckwell.*

Tenancy in common is also a tenancy or interest in property arising by express grant or gift, or by express or implied agreement between the parties.

2. Tenancy in common.

[1] *Doe* v. *Parratt* (1794), 5 T. R., 652.

[2] 45 & 46 Vict., c. 75, secs. 1, 5.

[3] *Re March, Mander* v. *Harris* (1884), 27 Ch. D., 166; 51 L. T., 380; 32 W. R., 941; *Thornley* v. *Thornley* (1893), 2 Ch., 229; 62 L. J., Ch., 370.

[4] *Jupp* v. *Buckwell* (1888), 39 Ch. D., 148; 57 L. J., Ch., 774; 59 L. T., 129.

[5] The same rule applies if the gift is to husband and wife and others as tenants in common. But any indication, however slight, of intention to exclude the rule will be given effect to (*Dias* v. *De Livera* (1880), 5 App. Ca., 123; 42 L. T., 267; 49 L. J., P. C., 26). So that the presence of only one "and" will prevent the rule applying. Thus a gift to A, B, C, and D equally, C and D being husband and wife, was held to make the estate divisible in four equal parts in *Warrington* v. *Warrington* (1842), 2 Hare, 54; and this was followed in 1889 by North, J., in *Re Dixon, Byram* v. *Tull.* 42 Ch. D., 306; 61 L. T., 718; 38 W. R., 91.

The essential feature is unity of possession in an exactly similar way to joint tenancy; but, though there may be, there need not be, existing any of the other three unities. There is never the *jus accrescendi*, and herein lies the great distinction between the two tenancies. It is more usual to find property limited by way of tenancy in common than joint tenancy, except in the one case of trusteeship, for there it is naturally desired that on the death of one trustee the legal interest should survive to the others. It is most essential to compare the two tenancies in the light of survivorship. It is true that a joint tenant may alienate his individual share by instrument *inter vivos*, but he cannot do so by his will, whilst a tenant in common can do both. If a joint tenant dies intestate, no interest in the property passes to his heir or next-of-kin, but in tenancy in common it is otherwise. It may correctly be said as regards joint tenants, *jus accrescendi ultimæ voluntati præfertur*, and also *jus accrescendi præfertur oneribus* (like curtesy and dower); but neither of these statements would be correct as regards a tenancy in common.

Comparison.

Morley v. *Bird.*

As we have seen, if property is simply given to two or more persons without any words of severance they are joint tenants[1]. To make them tenants in common it must either be expressed that they are to hold in that manner, or there must be some words of severance, *e.g.*, "equally," or "share and share alike." This was the rule of Law, and Equity followed the Law, but still the Court of Chancery from very early times has disfavoured a joint tenancy, and has always, where possible, held it to be a tenancy in common. This is a matter that can best be considered in studying the principles of Equity and the maxim Equality is Equity[2].

Indermaur & Thwaites' Equity, 21.

[1] Ante, p. 32.

[2] Indermaur & Thwaites' Equity, 21; *Lake v. Gibson* (1729), 2 Wh. & Tu., 952.

3. Co-parcenary.

Co-parcenary is a joint ownership existing only in the case of realty, occurring where two or more persons together constitute the heir, *e.g.*, where land on failure of sons descends to the daughters equally, or where a man dies possessed of gavelkind land and leaving several sons. In the one case the daughters, and in the other case the sons, take as co-parceners. Co-parcenary can only arise by descent, and can only apply to estates of inheritance. Within these limits, the position of co-parceners is much the same as that of tenants in common; but whereas in tenancy in common the only essential unity is possession, in co-parcenary there are naturally unities of title and of possession. There is no *jus accrescendi* in co-parcenary, and so if two daughters together take as co-parceners, and one dies intestate leaving a son, her entire share goes to her son, and nothing is taken by her sister[1]. Contrasting realty with personalty, suppose A dies intestate, possessed of realty and personalty and leaving surviving no son but two daughters, they take his whole property, but whilst they have a single interest in the realty, they have separate interests in the personalty, which will be divided and half given to each. The Land Transfer Act 1897 cannot have made any substantial change in the position of co-parceners, for though under it realty, like personalty, now vests primarily in the personal representatives, yet that is only for the purposes of the winding up of the estate; and, subject to any requirements for debts, the land must be made over to the persons entitled, who must take as before the Act[2].

Contrast as to two together taking realty and personalty.

Land Transfer Act 1897.

Every joint owner of property may in general enjoy it as he pleases, and, therefore, the Court will

Rights of joint owner

[1] *Cooper* v. *France* (1850), 14 Jur., 214.

[2] See further as to this provision of the Land Transfer Act 1897, post, p. 240.

not usually grant an injunction to restrain any one of them from committing waste, simply leaving each party to his remedy to recover his proper share of any profit obtained by the other. But the Court will interfere to prevent malicious or destructive waste, *e.g.*, the pulling down of a house [1].

Partition.

Any joint ownership between beneficial owners, as distinguished from trustees, is in its very nature generally unsatisfactory. But any of such joint owners may always terminate such a holding by means of partition, as to co-parceners by the old Common Law, and as to joint tenants and tenants in common by reason of legislation to which it is unnecessary to refer. Tenants by entireties, it seems, could not effect partition at all, because of the rights the wife would have by survivorship, but as this tenancy is now practically obsolete that is of no importance. Partition may be effected in any of the following ways:—

1. By mutual arrangement between the parties. This must be by deed[2], such deed in the case of joint tenants taking the form of a release, in the case of tenants in common a grant, and in the case of co-parceners a release or a grant.

2. Through the agency of the Board of Agriculture and Fisheries, under the provisions of the General Enclosure Act 1845 [3].

Indermaur & Thwaites' Equity, 330-337.

3. By means of an action in the Chancery Division of the High Court of Justice, in which case the Court has now under the Partition Act 1868[4] very full powers to direct a sale if that appears more advisable than making a division of the property. The details in connection with this subject are more

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[1] 2 Wh. & Tu., 1007.
[2] 8 & 9 Vict., c. 106, sec. 3.
[3] 8 & 9 Vict., c. 118, secs. 147-150.
[4] 31 & 32 Vict., c. 40.

appropriately considered in studying the subject of Equity [1].

Severance of joint ownership.

But, in addition to partition, the particular joint ownership may be severed in other ways. Leaving, therefore, partition out of the question, as applying equally in all cases, we have to note the other different ways of altering the ownership.

Severance of joint tenancy.

A joint tenancy may be severed in any of the following ways :—

1. By alienation, *e.g.*, if A and B are joint tenants, and A alienates his share to C, here B and C will not be joint tenants; they have neither unity of title, nor of commencement of title, and are tenants in common. So if A, B, and C are joint tenants, and A alienates his share to X, though B and C remain joint tenants, X is tenant in common with them, and the original holding is thus severed. The alienation may be by deed of gift, marriage settlement, conveyance on sale or mortgage, or even a contract to sell. But it must be alienation *inter vivos*, as a joint tenant cannot effectually dispose of his interest by will, the rule being *jus accrescendi ultimæ voluntati præfertur*. And if a female joint tenant of freeholds or leaseholds marries, the joint tenancy has never been severed by the marriage, or even by the husband and the other joint tenant demising the land [2].

2. By accession of interest. One essential feature of a joint tenancy is unity of interest; if, therefore, A and B being joint tenants for life, A purchases the reversion in fee simple to the whole estate the original joint tenancy is severed, and they become tenants in common.

3. By all the titles becoming united in one person,

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[1] Indermaur & Thwaites' Equity, 330-337.
[2] *Palmer* v. *Rich* (1897), 1 Ch., 134; 66 L. J., Ch., 69.

either by survivorship, or by acquiring the other interests in any way.

As regards the first and second severances above mentioned, it will be observed that it is really only the substitution of one joint ownership for another. As regards the third, the party acquiring the interests becomes the owner in severalty.

Severance of tenancy in common.

A tenancy in common may be severed by the uniting of all the titles and interests in one tenant, either by reason of some instrument *inter vivos*, or natural devolution on death. Thus if A, B, and C are tenants in common, and C conveys his interest to X, this is no severance. A, B, and X hold as tenants in common. If, however, B and C convey or devise their shares to A, or they both die and A is their heir, then there is naturally a severance, because A is now possessed of the entire interest.

Severance of co-parcenary.

Co-parcenary may be severed in either of the following ways:—

1. By alienation. A and B are two sisters holding as co-parceners. B conveys her share to X. A and X are not co-parceners, but are tenants in common as between each other. This is only a change of one joint ownership for another.

2. By all the interests becoming vested in one of the co-parceners either by some instrument *inter vivos*, will, or descent. There is then naturally a holding in severalty.

There can be little advantage in changing one joint ownership for another, and with regard to all these holdings we may say that the only satisfactory course is either for the parties to effect a partition or for one to acquire in some way the whole estate or interest.

As regards the foregoing three different joint ownerships, they arise either by the act of the party conferring the estate, or by operation of law. As to co-parcenary, it can only arise in the latter way, which, on the other hand, cannot be the case as regards either joint tenancy, or tenancy in common. They must arise either by the grantor's act in the conveyance or will or by the parties' own arrangement, which is not likely often to happen. When, however, we turn to our remaining case of joint ownership, viz., partnership, this we find invariably to be a position created by the parties' own acts.

4. Partnership.

Partnership is a relationship, or joint ownership, existing between two or more persons who are together carrying on a trade, occupation, or profession, with a view to profit[1]. It is a matter of voluntary arrangement between them, and in the course of it they may become possessed of real and of personal property, which is then said to be held by them in partnership.

Partnership Act 1890.

The law of partnership generally has been codified by the Partnership Act 1890[2]. The subject is a wide one, but we have here only to deal with it in a conveyancing light. With the powers and duties of partners we have nothing to do, that being a subject appertaining to Common Law[3]; neither have we anything to do with the remedies existing between them, that being most properly a subject appertaining to Equity[4]. We have only here to do with the ownership, the constitution, and the general position of partners; in fact, with such matters as can properly be considered as coming within the scope of conveyancing principles and practice.

Indermaur's Common Law, 156-165.

Indermaur & Thwaites' Equity, 168-178.

[1] 53 & 54 Vict., c. 39, sec. 1.
[2] 53 & 54 Vict., c. 39.
[3] See hereon Indermaur's Common Law, 156-165.
[4] See hereon Indermaur & Thwaites' Equity, 168-178.

Limit of members of a partnership.

Originally, any number of persons could combine together and make themselves partners. But this is not so now, for the Companies (Consolidation) Act 1908 provides that a partnership cannot be formed of more than ten persons for banking, or twenty for any other business, and that any seven persons (or for a private company, two persons) may form themselves into an incorporated company[1].

Property of partnership.

Persons may be partners in business generally, or simply in one particular joint adventure, and both real and personal property may be included in the enterprise. The Partnership Act 1890 provides that all property, rights, and interests in property originally brought into the partnership, or acquired in any way on account of the firm, constitute partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement[2]; and that any land which has become partnership property shall, unless the contrary intention appears, be treated, as between the partners and their representatives, as personal estate[3]. It is very important to observe this, and also that in partnership there is no right of survivorship, the rule being, *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* If, therefore, two or more persons become partners, on the death of one of them his personal representatives have a right to his share. The partnership is dissolved and, in the absence of agreement to the contrary, the whole concern must be wound up, but the survivors do not take any advantage. This principle applies even to the goodwill of the partnership concern[4]. The difficulty, however, sometimes is to

[1] 8 Edw. VII., c. 69, secs. 1, 2, 121, replacing 25 & 26 Vict., c. 89, sec. 4.
[2] Partnership Act 1890, sec. 20.
[3] Ibid., sec. 22.
[4] *Levy* v. *Walker* (1879), 10 Ch. D., 436; 48 L. J., Ch., 273.

ascertain what is, and what is not, part of the partnership property. Thus, in one case, a nurseryman devised the land on which his business was carried on and bequeathed the goodwill of his business to his three sons, as tenants in common, in equal shares. After his death the three sons continued to carry on the business on the land in partnership. It was held that though the land was devised to them as tenants in common, they had by their conduct made it partnership property[1]. On the other hand, where A and B were tenants in common of a colliery, and then started working it as partners, it was held that this did not make the colliery itself partnership property[2]. Such difficulties cannot arise where there is a proper partnership deed or agreement, for that defines the property, and then, generally, nothing else will be partnership property unless bought out of the partnership moneys. It is often very important to determine whether property is held in partnership or not, firstly, because though it consists of realty, if it is partnership property, it is treated as between the partners and the heirs and next-of-kin of a deceased partner as personalty, and secondly, because though partnership is a kind of joint tenancy, yet it is, at any rate, a joint tenancy without right of survivorship.

Waterer v. *Waterer.*

Crawshay v. *Maule.*

Persons may enter into any ordinary partnership without any deed or agreement in writing; but if it is a partnership in land, signed writing is necessary to satisfy the Statute of Frauds, *e.g.*, in the case of a partnership in a mining lease[3]. Whether there is, or is not, a deed or agreement in writing, if no fixed term of duration of the partnership is agreed

Partner without specific agreement.

[1] *Waterer* v. *Waterer* (1873), L. R., 15 Eq., 402.
[2] *Crawshay* v. *Maule* (1818), 1 Swanst., 495.
[3] *Caddick* v. *Skidmore* (1857), 2 De G. & J., 52; 27 L. J., Ch., 153; *Isaac* v. *Evans*, 16 *Times L. R.*, 113; *Law Students' Journal*, 1900, p. 26.

on, it is said to be a partnership at will, and is ordinarily determinable at the pleasure of any partner. If there is no specific agreement, then partners are deemed to be equally interested; they have in all matters equal rights, they must act fairly and honestly as regards each other, and must not do any act that may work injury to the partnership concern. One is as good as another, and their rights generally are equal.

Partnership articles.

It is, however, usual on persons entering into partnership, that they execute a deed or agreement in writing accurately defining their position. This is very advisable in order to shew clearly the rights of the parties and to prevent disputes. The partnership deed, or partnership articles, should, at any rate as a rule, deal with the following matters:—

1. The nature of the business, and the duration of the partnership, stating whether it is for life, or a fixed term, or determinable on any and what notice.

2. The name or style of the firm, and the place of business.

3. The bankers of the partnership.

4. The amount of capital, what constitutes the capital, and the interests of the partners therein.

5. The shares in which the partners are to take the profits.

6. The keeping of books, the taking of accounts, and the making out of balance sheets.

7. The drawings that the partners are entitled from time to time to make.

8. The position on death or dissolution.

9. A provision that on disputes arising they shall be referred to arbitration.

In many cases the deed is far more elaborate, containing a variety of provisions according to the

circumstances of each particular case. It must be remembered that the partnership articles are to form the foundation of the parties' rights, and that they are to work upon that foundation. It is, therefore, advisable, particularly in the case of large and important businesses, to make the document as full and detailed as possible. The trades, businesses, and professions that may be carried on in partnership are naturally of innumerable variety, and every particular case may demand special clauses and provisions. The above particulars, therefore, must be taken merely as an outline of the main provisions, and the reader will do well to consider various precedents of partnership deeds, and look at the whole matter in a practical light [1].

Death or retirement.

It must be borne in mind that as the death or retirement of a partner causes a dissolution of the partnership, it will be necessary, when such an event happens, to have a complete realization and division of the whole partnership property, including all land, goods, debts, and even the goodwill of the concern. This may be most injurious to the interests of the remaining partners, and it will be noticed that the eighth point above mentioned, as being dealt with in the partnership articles, is to provide for the position on death or dissolution. One plan that may be adopted is to provide that the dead or outgoing partner's share of capital shall be taken at its value as ascertained by the last yearly balance sheet, and that some fixed sum by way of interest from that time up to the death or retirement shall be allowed in lieu of profits. This plan obviates the necessity for any new balancing of accounts, but is open to this objection, that if there has been any loss since the last stocktaking, that loss will fall on the continuing partners alone.

[1] For precedents, see 2 Prideaux, 778-802.

Another and preferable plan, therefore, that may be adopted, is to give to the continuing partners the option of purchasing the share of the deceased or retiring partner at a valuation. Under this, if the remaining partners think it worth their while, they can prevent any realization by thus purchasing. In framing any provisions as to the rights on death or retirement, it should be expressly stated whether anything is to be allowed for the goodwill, for that is an asset of the partnership, though not always a valuable one[1]. No doubt if A and B, being partners, voluntarily dissolve, and wish to sell everything to the best advantage, they will sell the goodwill, giving a covenant to the purchaser not to carry on a similar business within reasonable limits. But suppose that B dies, and the goodwill is then sold, here A cannot be compelled to enter into any such covenant, and there is nothing to prevent him starting another business, although it is true that he must not in any way represent that he is still carrying on the same business, nor must he solicit the customers of the old firm [2].

Goodwill.

Trego v. *Hunt*

Purchase of land by firm.

If partners buy land, the usual way is to take the conveyance to the use of the partners (by name) in fee simple as joint tenants in trust for the partners (by name), their heirs, executors, administrators and assigns as part of their partnership property. Express power is generally inserted for the trustees or trustee for the time being to sell, mortgage, or lease, and to give effectual discharges for moneys so arising, and another power for the partners for the time being to appoint a new trustee in the place of any who shall have ceased to be a partner [3].

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[1] 2 Prideaux, 776.
[2] *Trego* v. *Hunt* (1896), A. C., 7; 65 L. J., Ch., 1; 73 L. T., 514.
[3] 1 Prideaux, 317; 1 K. & E., 436.

Mortgage by surviving partner.

If a partnership is dissolved by death, the survivor can give a valid legal or equitable mortgage over the partnership realty or personalty to anyone dealing with him in good faith, unless the partnership articles say otherwise [1].

Lease by one partner to firm.

If the partnership firm is to take a lease of one partner's property, the lease should always be granted to the other partners or to a stranger in trust for the firm, as the same person cannot be both lessor and lessee, and then no difficulty arises as to the validity of the lease and as to the operation of the covenants and lessor's remedies [2].

Alienation of share of a partner.

We have seen that a joint tenant, a tenant in common, or a co-parcener, can alienate his interest, though a joint tenant cannot do so by his will. A partner also can alienate his share in the partnership concern, but he certainly cannot make his alienee a partner by so doing, unless all his co-partners consent thereto [3]. The most that he can do in this direction is to effect a separate or sub-partnership. As regards the exact effect of an assignment by one partner of his share or interest, the Partnership Act 1890 contains an express provision that it shall not entitle the assignee to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions or to inspect the books, but entitles him only to receive the shares of capital and profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners [4].

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[1] *Re Bourne* (1906), 2 Ch., 427 ; 75 L. J., Ch., 779 ; 95 L. T., 131.
[2] *Boyce* v. *Edbrooke* (1903), 1 Ch., 836 ; 72 L. J., Ch., 547 ; 88 L. T., 344.
[3] Partnership Act 1890, sec. 24 (7).
[4] Ibid., sec. 31.

Companies.

Closely connected with the topic of Partnership is that of Companies. A company is a corporation, and consists of a number of persons united together generally for commercial purposes. The interests of the various persons concerned are styled "shares." Companies may be constituted by Royal Charters, or by special Acts of Parliament, or under the provisions of the Companies Acts now to be found in the Companies (Consolidation) Act 1908[1]. Shares in companies are generally personal property, but in some few cases real property, *e.g.*, shares in the New River Co.[2], River Avon Co., Bath Navigation Co. and Aire & Calder Navigation Co. The subject of companies generally is outside the scope of this work[3].

[1] 8 Edw. VII., c. 69.

[2] But see hereon sec. 9 (7) of Metropolis Water Act 1902.

[3] The student is referred for a study of Company Law to Eustace Smith's Summary of the Law of Companies, a work specially written for students; and for a wider study to Palmer's Company Law.

CHAPTER III.

LEGAL AND EQUITABLE ESTATES AND INTERESTS, AND HEREIN OF TRUSTEES.

Owners of legal and equitable estates.

Law and Equity were, prior to the Judicature Act 1873, distinct systems, and accordingly one person might be the owner of property according to the rules of Law, and another according to the rules of Equity. The one was said to be possessed of the legal estate or interest, and the other of the equitable or beneficial estate or interest. If property was simply held by a person for his own benefit, then he was said to be both the legal, and the beneficial or equitable, owner. The Judicature Act fused Law and Equity into one system, but it did not alter the two positions. At the present day, therefore, one person may have both the legal, and the equitable or beneficial, ownership in him; or he may have but the legal ownership, in which case he is styled a trustee, and another may have the beneficial interest, in which case he is called the *cestui que trust*. We have in this chapter to consider and compare the positions of the legal and the equitable owner.

All property generally may be the subject of a trust.

All property, real or personal, and whether held in possession or as a future interest, may be made the subject of a trust, unless the policy of the law, or any statutory enactment, prohibits the parting with the beneficial interest, or, in the case of real estate, unless the tenure under which it is held is inconsistent with the trust sought to be created. Thus where with respect to copyholds there is in the manor no

custom to entail[1], an equitable estate tail cannot be created by way of trust[2]. The kind of trust with which we have to deal is what is known as an express trust, or one created by the act of the party. We have nothing to do with constructive or implied trusts, both of which arise by construction of the Court, and are, properly, matters to be considered in studying the principles of Equity[3]. To create an express trust, writing is always advisable, and in the case of land (including leaseholds) writing is absolutely necessary[4]. Writing is always necessary for the assignment of any trust[5].

Indermaur & Thwaites' Equity, 52-62.

History of trusts.

There is nothing useful to consider in the way of history as regards trusts of personal property. Personal property always, since the earliest days of Chancery, could be held by one person for the benefit of another; but as regards land, the history of the law affecting the matter is most important. If that is not mastered, the law of trusts of land, as it stands now, including many points in connection with both settlements and wills, can never be properly understood.

The origin of uses.

Any holding of land by one person for the benefit of another was naturally unknown in the scheme of feudalism, and to our Courts of Law; and such a holding owes its origin entirely to the Court of Chancery as it existed in its earliest days. The notion of such a mode of holding land, no doubt, first arose from the ingenuity of the ecclesiastics. Finding that the feudal rules did not permit a corporation to hold land, they conceived the idea of

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[1] Ante, p. 24.
[2] *Allen* v. *Bewsey* (1878), 7 Ch. D., 466.
[3] See as to these, Indermaur & Thwaites' Equity, 52-62.
[4] 29 Car. II., c. 3, sec. 7.
[5] Ibid., sec. 9.

having land conveyed to a private individual for the benefit—or, as it was styled, the use—of the corporation. For such purposes land was, therefore, often thus conveyed. Again, this use or beneficial interest in the land was not liable to any of the feudal burthens and incidents, *e.g.*, escheat[1], and, therefore, a person who felt in danger as regards an escheat through possible attainder, would convey his lands to some peaceable individual to hold to his use. Furthermore, the feudal rules did not permit of alienation of land by will, but there was nothing to prevent a person conveying land to some friend to hold to such uses as he might name by his will, and then making a will to dispose of the use or beneficial interest. There were thus good reasons for conveying land to uses. In all these cases there was the one permanent legal owner; the Courts of Law recognized no one but him, but the Court of Chancery compelled him to hold for the benefit of the person in whose favour the use was declared. Here, therefore, we have the origin of the legal and the equitable ownership of land, as things distinct and apart from each other.

Reason of passing of Statute of Uses.

Naturally, the conveyance of land to uses became popular with the people, though not with the lords. The latter found themselves very often defrauded of their dues, for, coming to claim them, they would find their claim of no avail, because the person against whom they made it was but the equitable owner, and had in the eyes of the law no existence. The lords at last, in 1535, procured the passing of the Statute of Uses[2], which enacts that where a person is seised of land to the use, trust, or confidence of another, the latter shall be deemed to be the legal owner thereof. The idea was this—Con-

27 Hy. VIII., c. 10.

[1] As to which, see post, p. 257.
[2] 27 Hy. VIII., c. 10.

veyance to A to the use of B. A was the only person recognized at law, but, by reason of the doctrine of Chancery, B was the substantial owner, as he took all the benefit. The statute was meant to blot A out of existence, and to make B the legal as well as the beneficial owner. The object of the statute was, in short, to prevent it being possible that one man could hold land for the benefit of another. The statute requires a person to be seised. Consequently it does not apply to pure personalty or leaseholds or copyholds but only to freeholds, as a freeholder is seised and the owners of the other properties just named are only possessed. There was no need to meddle with trusts of personalty, for such a holding did not affect anyone except the individuals concerned, and the copyholder was at that time but a villein, and not likely to form the subject of legislation. It may also be noticed that the statute does not strictly apply to wills; for alienation by will in a direct manner was then unknown, and further as regards wills the governing rule was, and is, that the testator's intention shall be observed.

Frustration of the Statute of Uses.

Having started, therefore, with the perfectly correct notion that a use in land signified an equitable interest, we find that the design of this statute was to make it the legal interest. Before the statute, if land was conveyed to A to the use of B, the legal ownership was in A as a trustee for B. By the statute, A was utterly displaced, and B became the legal as well as beneficial owner. Yet at the present day nothing is more common than to find one person a trustee of land for another. It is then necessary to observe how the object of the Statute of Uses has been frustrated, for it is still an existing statute.

Tyrrell's Case.

We find the elucidation of the matter in two harsh decisions of the Courts of Law, and in the softening

influence of the Court of Chancery, anxious to regain a jurisdiction which for the time being it had lost. In 1557 in *Tyrrell's Case*[1] the problem was put to a Court of Law: What is the effect of a conveyance of freehold land to A, to the use of B, to the use of C? The Court decided that B took the estate and that C took nothing—in other words that there could not be a use upon a use. Again this problem was put: What is the effect of a conveyance of freehold land to A, accompanied by a direction to receive the rents and pay them to B? It was manifest that A could not receive the rents, unless he had the ownership, and therefore the Court, in the case of *Barker* v. *Greenwood*[2], held that B had not really a use or benefit within the meaning of the statute; but that A had the use to enable him to receive the rents, and that they could recognize no one else. The Court said it was different if land was conveyed to A with a direction to permit B to receive the rents, for here A had no active duty to perform, and therefore they recognized B as the owner. These two problems being thus solved by the Courts of Law, it is not to be wondered at that Chancery saw its way to interfering. Chancery politely bowed to the Common Law ruling, and admitted its force, but said that in conscience it must, in each case, compel the legal owner to account to the person who was evidently really meant to benefit. Dealing with the point in *Tyrrell's Case*, the Court of Chancery held that B was but a trustee for C; and dealing with the point in *Barker* v. *Greenwood*, it held that A was a trustee for B. Thus the Court of Chancery regained its jurisdiction, and the distinction between legal and equitable ownership became stronger than ever. The practical effect was that by adding the words "to the use of" to a conveyance,

Barker v. *Greenwood.*

[1] Tudor's Conveyancing Cases, 289.
[2] (1839) 4 M. & W., 429.

the position was the same as it had been prior to the passing of the Statute of Uses. Suppose it were wished that X should be a trustee for Z. Before the Statute of Uses, the freeholds would have been conveyed to X to the use of Z. After the statute, they would be conveyed to A, to the use of X, to the use of Z; or, simpler still, unto and to the use of X to the use of Z. Here we have the position exactly the same as before, viz., X a trustee for Z. It is a plain rule to lay down that, in the case of uses, any person named before the declaration of a use takes no estate at all, the person who has the first use has the legal estate, and the person who has the last use has the equitable or beneficial estate. If there are twenty uses declared, the rule holds good, the intervening uses between the first and the last are absolutely without meaning.

Seisinee to uses.

A person, then, who is named before a use is declared, takes no estate, but he has got a name—he is the seisinee to uses. Though he takes no estate, an estate is passed through him; and no estate can vest in the owner of the use that has not been passed through the seisinee to uses, who, therefore, has rightly been sometimes compared to a conduit pipe, an article that passes something, though it does not retain anything. If land is conveyed to A, to the use of B and his heirs, B will take but an estate for the life of A, for that is all that passed through A. To give B a fee simple, the conveyance should have been to A and his heirs, to the use of B and his heirs.

Scintilla juris.

There was long, however, doubt and controversy on one point in connection with this matter. Admitted that if land were given to A and his heirs, to the use of B and his heirs, A took nothing, was it equally so if the land were given to A and his heirs, to the use of B and his heirs, but if a

certain event happened to the use of C and his heirs? If the event happened C was to take, and how could he take unless there was something left in A? No one doubted that C did take if the event happened, and the point was merely a scholarly one. The doctrine that to some extent prevailed was, that though there was no actual estate in A, yet there was a spark or *scintilla* of seisin left in him, so as to enable C's estate to take effect if the event happened. This was known as the doctrine of *scintilla juris*, a doctrine not of the slightest practical importance at any time, and which received its death blow in the year 1860, when it was enacted that C's future estate should take effect at the proper time, by force of the original seisin momentarily vested in the seisinee to uses, and that there should not be deemed to be any continuing *scintilla juris* in him[1].

The doctrine of resulting use.

The direct effect of the Statute of Uses on the practice of conveyancing is very curious and important, and we are continually confronted with it. Thus we almost invariably find that in a deed of conveyance, quite apart from any idea of a trust, the land is not simply conveyed "to the grantee," but "unto and to the use of the grantee." Is there any need for this? Certainly not if there is any consideration, either valuable or good, for the grant; but if there is no consideration, *i.e.*, if the instrument is really and truly a voluntary grant, then there is. Before the Statute of Uses if, for consideration, land was conveyed to A, he would naturally be presumed to be meant to hold the land for his own use and benefit. But if there were no consideration, then it would very naturally be presumed that the land had been conveyed to A for some private purpose of the conveying party, and there would be a resulting use to

[1] 23 & 24 Vict., c. 38, sec. 7.

him, the effect of which was that A was a trustee for him. As the Statute of Uses converts the use into the legal estate, it follows that since that statute in such a case, not merely the equitable, but the legal estate, must result back to the conveying party, and the conveyance would in effect be a nullity. In a voluntary conveyance, therefore, to prevent the doctrine of a resulting use it is absolutely necessary to convey "unto and to the use" of the grantee; in a conveyance for which there is either good or valuable consideration the words "and to the use" are surplusage, and they may be regarded merely as words that have been commonly adopted as a sort of extra safety, where nothing of the kind was needed.

From the foregoing observations we may draw the following deductions :—

1. There may be two owners of property, the legal and the equitable.
2. There may be estates and rights in the equitable interest analogous to those which may exist in the legal interest.
3. To create a distinct legal and a distinct equitable estate in freeholds by an instrument *inter vivos*, it is necessary to have recourse to the Statute of Uses.
4. This is never necessary in the case of wills.
5. The Statute of Uses does not apply to copyholds, or to leaseholds, or any other personal property.

Classification of express trusts.

Express trusts may be classified in the following ways :—

1. Voluntary trusts, and trusts based upon value.
2. Executed, and executory trusts.
3. Active trusts, and bare or passive trusts.

Indermaur & Thwaites' Equity, 37-49.

The first two classes can be sufficiently and most appropriately considered in studying Equity[1], but a

[1] Indermaur & Thwaites' Equity, 37-49.

few words may here be usefully written with regard to the third class. Where the legal ownership in land is simply vested in one person, another having the absolute beneficial interest therein, the former is said to be merely a bare trustee, that is, he is clothed with the legal estate, but his only duty is to convey the land to the latter, who, being absolutely interested, is entitled to dispense with the services of the trustee. Where, however, the legal owner has some duties to perform as incidental to his ownership, beyond the mere duty to convey, then he is styled an active trustee. Thus, if land is vested in A and his heirs as a trustee, upon trust to manage the property, and receive the rents and pay the same to B during his life, and at his death to hold the property for the benefit of C and his heirs, during the life of B, A is an active trustee, but at B's death he becomes a bare or passive trustee—his only duty is to convey to C [1].

Bare and active trusts.

Where real property is vested in persons as trustees, it is proper to limit the estate to them by the use of words similar to those which would be used in conferring a beneficial estate. Thus a grant unto and to the use of A upon certain trusts would only confer the legal estate upon A for his life. In the case of a will, however, we find that this strict rule is not adhered to, but it is the intention which governs. The old rule before the Wills Act 1837 was, that where land was devised to trustees upon certain trusts without its being specified what estate they were to take, they would take just such an estate as was necessary for the purposes of their trust. This often gave rise to doubts and difficulties as to what estate trustees took, and it has therefore been provided that where there is no express limitation as to duration of interest, they shall always

Estate of trustees.

[1] 2 Prideaux, 190.

take a freehold interest, and if the beneficial interest is not given to any person for life, or though so given, the purposes of the trust may endure beyond the life of such person, then they shall take the fee simple[1].

Death of trustee.

The direct duty of the legal owner who is an active trustee is, of course, to obey the terms of the trust instrument, and when he becomes a bare trustee to convey the legal estate to the person absolutely entitled. It is necessary to consider what becomes of the property if the trustee dies while the legal estate is still vested in him. It is usual to have two or more trustees, and they are invariably made joint tenants, so that on the death of one trustee the whole estate or interest survives to the remaining trustee or trustees. If, however, a sole or last surviving trustee dies, then the trust property naturally must devolve either upon some person to whom he gives it by his will, or upon the person recognized by the law as his representative, who must hold it upon the same terms as it was held by the deceased trustee.

Personal estate.

The devolution of the legal ownership of personal property on the death of a sole trustee is simple enough. It must pass to the trustee's legal personal representative, *i.e.*, to his executor or administrator.

Real estate.

As to real property, however, the matter cannot be so quickly disposed of. If the trustee died intestate, then it formerly always passed to his heir, but if he had left a will it might pass under his will. It was customary to insert in a will an express devise of trust property, and even if that were not done, but the will contained a devise of real estate in general terms, the freehold and copyhold trust property would

Lord Braybrooke v. *Inskip.*

[1] 1 Vict., c. 26, secs. 30, 31; see further, post, Chap. XVI.; 2 Prideaux, 563, 564.

pass to that devisee provided there was no evidence of any contrary intention[1]. This was so, even though the property was not held upon an express, but only upon an implied or constructive trust[2]. This is still the law as regards deaths prior to 1st January, 1882, but with regard to persons dying on or since that date, the law is different as regards freeholds, though it still remains as before with regard to copyholds. The Conveyancing Act 1881 enacted that when a sole or last surviving trustee dies after 1881, the trust property shall, notwithstanding any testamentary disposition, vest in his executor or administrator, who shall have all proper powers and shall be deemed the heirs and assigns of the deceased trustee[3]. This enactment included copyholds, but this is not so now. The Copyhold Act 1887 repealed this enactment as from 16th September, 1887, as regards copyholds[4], and the Copyhold Act 1894 now provides that the above-mentioned provision in the Conveyancing Act 1881 shall not apply to copyhold land vested in the tenant on the court rolls on trust[5]. We are, therefore, now in this position when a sole or last surviving trustee[6] dies: if the trust property consists of personal estate, or of freeholds, it passes to the executor or administrator of the deceased trustee, but if the trust property consists of copyholds, it passes either to the trustee's customary heir, or under a devise in his will. Whoever it passes to, of course, holds it on the same trusts as the deceased trustee held it. Whether such person can actively execute the trusts depends upon whether he is pointed out in the instrument creating the trust as

Conveyancing Act 1881, sec. 30.

Copyholds.

[1] *Lord Braybrooke* v. *Inskip* (1803), Tudor's Conveyancing Cases, 322.
[2] *Lysaght* v. *Edwards* (1878), 2 Ch. D., 490; 45 L. J., Ch., 554.
[3] 44 & 45 Vict., c. 41, sec. 30.
[4] 50 & 51 Vict., c. 73, sec. 45.
[5] 57 & 58 Vict., c. 46, sec. 88.
[6] The position is the same if a sole or last surviving mortgagee dies, by the same authorities.

being, in the contemplation of the settlor, a person who is to execute it, because section 30 of the Conveyancing Act 1881 does not give the legal personal representative of a sole or last surviving trustee or mortgagee any powers additional to those which the heir would have possessed apart from the section[1]. If such legal personal representative can, and does, carry out the trusts, he can at any time be superseded by an appointment of new trustees made by the person entitled to appoint[2].

Appointment of new trustees.

It is, however, proper and expedient to appoint new trustees when a sole or last surviving trustee dies, and, in fact, very often in other cases. New trustees may be appointed: (1) Under any express provisions contained in the instrument creating the trust, by such persons and on such events as therein provided. (2) Under section 10 of the Trustee Act 1893, by the person nominated for that purpose, by the trust instrument, and if no such person, by the surviving or continuing trustee, or the personal representative of the last surviving or continuing trustee. (3) By an order of the Court under section 25 of the Trustee Act 1893, if it is inexpedient or difficult or impracticable to appoint without the assistance of the Court, or if a trustee is convicted of felony or bankrupt. (4) By order of the Lunacy judge, if the person having power to appoint, or if the trustee, is a lunatic or person of unsound mind[3]. As to the two latter courses, an originating summons is taken out asking for the appointment, and on this an order is

[1] *Re Waidanis* (1908), 1 Ch., 123; 77 L. J., 12, where a devise to named trustees, their heirs and assigns, was held to entitle the surviving trustee's executors to carry out the trusts; and *Re Crunden & Meux* (1909), 1 Ch., 690; 78 L. J., Ch., 396; 100 L. T., 472, where a devise to four trustees without naming their heirs was held not to entitle the executors of the last trustee to carry out the trusts.

[2] *Re Routledge* (1909), 1 Ch., 280; 78 L. J., Ch., 136; 99 L. T., 919.

[3] Lunacy Act 1890, secs. 116, 118, 120, 128, 129, 133-143.

made, which order usually vests the trust property in the new trustee. Furthermore, it may be observed as regards appointments by the Court, that provision has now been made under which the Court may appoint a "judicial trustee" who is to be accountable to the Court and to act under the Court's supervision; he may, but need not necessarily be, an officer of the Court, and may, if the Court think fit, be remunerated. A "judicial trustee" will not, however, be appointed unless special reasons exist, and the making of such an appointment is a matter entirely in the Court's discretion [1]. A Public Trustee has now been created by statute, who may be appointed a custodian trustee, or an ordinary trustee, or a judicial trustee [2]. We are, however, here mainly concerned with the two first-mentioned modes of appointment of new trustees.

Judicial Trustee Act 1896.

Public Trustee.

As we have stated, the trust instrument may indicate the events on which new trustees may be appointed, and the mode of such appointment; but it is by no means necessary to have such provisions in any trust instrument, as the legislative provisions existing with regard to the matter are generally quite sufficient. The Trustee Act 1893 [3] provides that the person (if any) nominated by the trust instrument, or if no such person or he is unable or unwilling to act, the last surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee, may by writing appoint a new trustee or trustees where any trustee: (1) dies, (2) remains abroad for more than twelve months [4], (3) desires to be discharged, or (4) refuses,

Appointment under Trustee Act 1893.

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[1] *Re Ratcliff* (1898), 2 Ch., 352; 67 L. J., Ch., 562; 78 L. T., 834.
[2] 6 Edw. VII., c. 55 (Public Trustee Act 1906).
[3] 56 & 57 Vict., c. 53, sec. 10.
[4] This does not apply if a trustee goes abroad in April but comes back for a week in November and transacts trust business, and again goes abroad and stops there till the following July. See *Re Walker, Summer* v. *Barrow* (1901), 1 Ch., 259; 70 L. J., Ch., 229; 49 W. R., 167.

or is unfit, or incapable to act. On any such appointment the number of trustees may be increased, and there may be separate appointments in respect of distinct parts of the trust property held on separate trusts. It is not obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but except where only one trustee was originally appointed, a trustee is not to be discharged under this provision unless there will be at least two trustees to perform the trust. These provisions for the appointment of new trustees apply even to the case of a person nominated trustee in a will, but dying before the testator; and they include all trusts, whether created before or after the commencement of the Act[1]. But if a testator appoints a sole trustee who dies before him, the foregoing provision does not enable the personal representatives of such trustee to appoint a new trustee, for such person never in fact became a trustee[2].

Vesting of the trust property.

When new trustees are appointed, it is also necessary to vest the trust property in them. This is usually done by a simple declaration contained in the deed[3] of appointment, to the effect that the property shall vest in the new trustees, or jointly in the old and new trustees, and this declaration operates as a statutory conveyance. In the three following cases, however, a declaration is not sufficient to effect the vesting: (1) Where the trust property is copyholds, for here there must be the usual surrender and admittance. (2) Where the

[1] 56 & 57 Vict., c. 53, sec. 10.

[2] *Nicholson* v. *Field* (1893), 2 Ch., 511; 62 L. J., Ch., 1015; 69 L. T., 499.

[3] Although new trustees can be appointed by signed writing, a deed is required for a declaration to vest the trust property in them; compare secs. 10 and 12 of 56 & 57 Vict., c. 53.

trust property consists of mortgage investments, for here there must be transfers of the respective mortgages. (3) Where the trust property consists of any shares, stock, or other property only transferable in books kept by a company or other body, or in manner prescribed by any Act of Parliament, for here the particular proper mode of transfer must be adopted[1].

Retirement of trustee.

The Trustee Act 1893 also makes provision for the retirement of a trustee without any new trustee being appointed in his place. It enacts that where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and any other person empowered to appoint new trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom without any new trustee being appointed in his place[2]. The trust property (except in the three cases referred to in the last paragraph) is made to vest solely in the remaining trustees by means of a declaration to that effect contained in the deed of retirement[3]. In any case in which the Public Trustee is appointed an ordinary trustee of any trust, all or any of his co-trustees may retire by deed under the foregoing provision without any consents and although there will not be two trustees left[4].

As to rules governing trustees.

We see, therefore, that the legal owner, as distinguished from the equitable or beneficial owner,

[1] 56 & 57 Vict., c. 53, sec. 12.
[2] Ibid., sec. 11.
[3] Ibid., sec. 12.
[4] 7 Edw. VII., c. 55, sec. 5 (2).

may be either a person to whom the property was originally conveyed, or some person on whom it has devolved in one of the ways indicated; but whether he is the original trustee or a substituted one, the same rules prevail as regards him—he has the legal estate, and he has to act in accordance with the trust instrument. It is his duty to take due care of the trust property, to make himself acquainted with the terms of the trust, and to carry those terms into effect. And in doing his duty, he must pay regard to various rules that have been laid down from time to time by the Court of Chancery, and by Act of Parliament, for his governance and guidance. These are matters mainly appertaining to Equity, and must be considered there; but a few of such matters we cannot help incidentally touching upon here in considering the position of the trustee in a conveyancing sense[1].

Indermaur & Thwaites' Equity, Part II., chap. 2.

Powers of trustees.

To ascertain the powers of a trustee it is necessary to read the trust instrument, and we may find that he has a power to sell the property, to lease it, and to act in a variety of ways. The person creating the trust can of course indicate his desires to the fullest extent, providing only that he infringes no rule of law, or legislative provision, as to the holding and dealing with property. As an instance of what he cannot do we may refer to the Settled Land Act 1882, which makes any power of sale conferred on trustees subservient to the power which that statute vests in a tenant for life, a matter hereafter dealt with[2]. Further, we must notice that certain statutory powers are vested in trustees, particularly by the Trustee Act 1893, some of the provisions of which we will now enumerate.

Trustee Act 1893.

[1] See as to the position, duties, and liabilities of trustees, Indermaur & Thwaites' Equity, Part II., chap. 2, pp. 70-122.

[2] Post, p. 173.

1. A trustee may, unless expressly forbidden by the trust instrument, make various investments. The trust property may consist of money which it is necessary to invest so that it shall produce income, or though originally consisting of land it may have been sold, and the money may require to be invested. A long list of investments is given in the Act, and the following are some of them: Government securities of the United Kingdom; real securities, *i.e.*, mortgages of freehold or copyhold land in Great Britain or Ireland; stock of the Bank of England or Ireland; India 3 per cent. Stock; any securities the interest of which is guaranteed by Parliament; debentures of railway companies in Great Britain or Ireland which have for ten years last past paid a dividend of at least 3 per cent. on their ordinary stock; county council stock; certain colonial stocks; etc.[1] It will be observed that there is no direct power to invest on mortgage of leaseholds, but it is enacted that if a trustee has power to invest in real securities he may, unless expressly forbidden, invest on a mortgage of land held for an unexpired term of not less than 200 years, provided there is no rent greater than 1s. a year, and no right of redemption, and no condition of re-entry, except for non-payment of rent; and he may also invest on any charge, or mortgage of any charge, made under the Improvement of Land Act 1864[2].

Investments.

Indermaur & Thwaites' Equity, 82-94

Leaseholds.

A power to invest on real securities does not include an authority to buy land. So that a trustee commits a breach of trust by investing in the purchase of land, unless the trust instrument gives him express authority to buy land, or unless the trust funds are

[1] 56 & 57 Vict., c. 53, sec. 1. See further as to trustees' investments, Indermaur & Thwaites' Equity, 82-94.

[2] 56 & 57 Vict. c. 53. See as to these Land Charges, ante, p. 18.

Re Jenkins & Randall.

capital moneys under the Settled Land Acts. Yet a trustee who has committed such a breach of trust can make a perfectly good title to a purchaser who has notice of the breach of trust, unless all the beneficiaries are *sui juris* and elect to keep the land, *i.e.*, the trustee can make a good title by himself if any beneficiary is an infant, or with the concurrence of one beneficiary if all are *sui juris*[1].

Contributory mortgage.

With regard to a trustee investing money upon mortgage, the point has arisen as to whether he is justified in lending upon what is styled a contributory mortgage. Thus A is a trustee and has £1000 to invest. X has a good security but requires £1,500. B is willing to put in £500, and proposes that a mortgage should be given by X to himself (B) and to A jointly. Can A assent to this? It has been held that he cannot do so, as he would be depriving himself of the sole right to deal with a part of the trust property, and that would be a breach of trust[2].

Webb v. *Jonas.*

Selling.

2. When a trustee has a power of sale, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to any such conditions respecting title or evidence of title, or such other matters as he may think fit[3].

Insurance.

3. A trustee may insure any part of the trust property which consists of buildings in an amount not exceeding three-fourths of their value, and pay the premiums out of the income of the trust property[4].

[1] *Power* v. *Banks* (1901), 2 Ch., 487; 70 L. J., Ch., 700; 85 L. J., 376; *Re Jenkins & Randall's Contract* (1903), 2 Ch., 362; 72 L. J., Ch., 693; 88 L. T., 628.

[2] *Webb* v. *Jonas* (1888), 39 Ch. D., 660; 57 L. J., Ch., 671.

[3] 56 & 57 Vict., c. 53, sec. 13. This only applies where the trust instrument is dated since 1881.

[4] Ibid., sec. 18.

4. If he is a trustee of leaseholds for lives or years which are renewable from time to time, he may proceed to obtain a proper renewal, and pay the cost thereof out of any of the trust money in his hands, or raise the same by way of mortgage[1]. Renewing renewable leaseholds.

5. Two or more trustees acting together, or a sole acting trustee, where by the instrument creating the trust a sole trustee is authorized to act, may accept compositions, and compound claims, and execute all necessary releases and other things[2]. Compounding

The Trustee Act 1893 contains a codification of the principal matters affecting trustees, and a perusal of the Act itself is strongly recommended. It will form a useful adjunct to the study both of Conveyancing and of Equity combined. It is naturally difficult to sever matters relating to trustees which properly appertain to the subject of Conveyancing from such as more properly appertain to Equity.

All matters, however, which particularly refer to a sale by the legal owner, as distinguished from the equitable owner, should certainly be here dealt with, and we may first notice a trustee's position in the very inception of a sale, viz., as regards the contract to sell. Duties as regards contract of sale.

In making any contract for sale of the trust property, the trustee must take care to act prudently. If he is selling by auction, he should select the best place to sell at, the best time for selling, and the best person to sell, taking indeed every reasonable precaution, and acting as a prudent man would in the management of his own affairs. He should sell

[1] 56 & 57 Vict., c. 53, sec. 19.
[2] Ibid., sec. 21.

under proper conditions of sale, and not on an open contract, for to do so might be to burthen the trust estate with costs which ought not to be thrown upon it; but, at the same time, the conditions must not be too strict, for if they are unnecessarily so, they may tend to frighten away intending purchasers, and seriously injure the sale. The trustee must steer a prudent middle course, and in so far as he does not do so, he may be liable for a breach of trust; and it was formerly held that where a trustee sold under unnecessarily depreciatory conditions, no purchaser could be compelled to complete his purchase, or could in fact safely complete, for he would be taking with notice of a breach of trust[1]. However, as regards sales made since 24th December, 1888, the Trustee Act 1893 now provides[2] that a *cestui que trust* shall not be able to impeach a sale by his trustee on the ground that any condition of sale was unnecessarily depreciatory, unless the consideration for the sale was thereby rendered inadequate. The same section also provides that, after execution of the conveyance, no sale by a trustee shall be impeached as against the purchaser, on the ground of any conditions of sale being unnecessarily depreciatory, unless the purchaser was acting in collusion with the trustee when the contract for sale was made; and that in no case can any purchaser on a sale by a trustee make any objection to the title, upon the ground of the conditions having been depreciatory. The effect of this provision is, that a trustee will still be personally liable for any actual loss caused by improper conditions; and that, in such event, before completion, the sale can be set aside, but that, after completion, the purchaser is safe in his purchase, if he has not colluded with

Depreciatory conditions.

Trustee Act 1893.

[1] *Dunn* v. *Flood* (1885), 28 Ch. D., 586; 54 L. J., Ch., 370.

[2] Trustee Act 1893, sec. 14, in substitution for the now repealed provision of the Trustee Act 1888.

the trustee; and in no event can the purchaser raise the objection that the sale was made under depreciatory conditions.

Conjoint sale.

In the exercise of his power of sale, there is nothing to prevent a trustee making a conjoint sale, that is contracting to sell the trust property together with other property not comprised in the trust, if such a course appears to be advisable[1]. Thus A is a trustee of a mansion which has very little land attached to it, and in consequence thereof it is most difficult to find a purchaser. B, an adjoining landowner, is willing to sell his land, and to consent that the trust mansion and his land shall be put up for sale by auction in one lot. A may consent to this course, but before doing so he should attend to the following points: (1) He should get the report of a surveyor that the course proposed to be taken is advisable; (2) He should investigate B's title, for if he neglects to do so the whole sale may possibly fall through by reason of some defect in such title; (3) He should enter into an agreement with B as to the apportionment of the price that may be obtained, being guided in so doing by the advice of the surveyor. A purchaser from A and B in such a case need have no hesitation in completing his purchase, unless indeed he has notice of some impropriety in the transaction[2].

Selling land apart from the minerals. *Buckley* v. *Howell*.

It was formerly held that trustees who merely had an ordinary power of sale could not contract to sell the land apart from the minerals[3]. This decision invalidated many sales which had been made under an erroneous view of the law on the subject, and therefore was passed the Confirmation of Sales Act

[1] *Cavendish* v. *Cavendish* (1875), L. R., 10 Ch., 319.
[2] *Re Cooper & Allen* (1877), 4 Ch. D., 803; 46 L. J., Ch., 133.
[3] *Buckley* v. *Howell* (1861), 29 Beav., 546.

1862[1], which ratified all such sales as had previously been made, and provided that in future land could be sold apart from the minerals by obtaining the sanction of the Court. This provision is repealed by the Trustee Act 1893, but is re-enacted[2]. Trustees, therefore, who desire to sell land apart from the minerals, must apply by petition in the Chancery Division for the Court's sanction, unless indeed the trust instrument specially gives them power to do so. It should be noticed, however, that if land is settled, and a tenant for life is selling, he may without any sanction sell the surface apart from the minerals[3].

Trustees selling leaseholds must assign and not demise.

Trustees who are assignees of a lease, with an ordinary power of sale, can sell the property in lots by adopting conditions that the purchaser of a specified lot shall take an assignment of the lease and grant underleases to the purchasers of all the other lots at apportioned rents[4]. But the trustees may not retain the term and themselves grant underleases to the purchasers of the various lots at apportioned rents for the residue of the term less one day, for the trustees do not get rid of their liability by privity of estate to the lessor[5].

Conveyance.

The contract for sale being in order, there finally comes the conveyance by the trustee, or trustees, to the purchaser. It sometimes happens that a married woman is a trustee of land, and the question then arises as to whether she can convey by herself, or whether her husband must join. A husband had

[1] 25 & 26 Vict., c. 108.

[2] 56 & 57 Vict., c. 53, sec. 44; 57 Vict., c. 10, sec. 3.

[3] Settled Land Act 1882, sec. 17. As to a tenant for life's powers generally, see post, p. 174.

[4] *Re Judd & Sketcher* (1906), 1 Ch., 684; 75 L. J., Ch., 403; 94 L. T., 595.

[5] *Re Walker & Oakshott* (1901), 2 Ch., 383; 70 L. J., Ch., 666; 84 L. T., 809.

formerly certain interests in his wife's property, and she was, by reason of marriage, under certain disabilities, but the Married Women's Property Act 1882 placed her generally in the position of a *feme sole* as regards her property, and took away her husband's rights[1]. This Act of Parliament was, however, aimed at a married woman's own property, and did not affect her position as regards property of which she was a trustee. Before the Act a married woman, possessed of freeholds, could only convey them together with her husband, she being separately examined before a judge, or a commissioner, and acknowledging the deed, and this was equally so although she only held the property as a trustee. The Married Women's Property Act 1882 gave her independent powers and rights over her own property, but did not affect the position where she is a trustee, and, therefore, to convey real property, vested in her as a trustee, it was held she and her husband must both join, and she must acknowledge the deed[2]. A married woman who lends her own money on mortgage of real property can, of course, reconvey by herself, when the loan is paid off[3]. And since 7th August, 1874, if a married woman is merely a bare trustee of freehold or copyhold land, statute law has allowed her to convey as if she were a *feme sole*[4]. Also, where a married woman trustee has lent the trust funds on a mortgage, but it does not appear in the mortgage deed that she is a trustee, she can reconvey as a *feme sole*[5]; and even where the deed

Re Harkness & Allsopp.

Re Brooke & Fremlin.

Re West & Hardy.

[1] See hereon, post, p. 226.

[2] *Re Harkness & Allsopp* (1896), 2 Ch., 358; 65 L. J., Ch., 726; 74 L. T., 652; 44 W. R., 683.

[3] *Re Brooke & Fremlin* (1898), 1 Ch., 647; 67 L. J., Ch., 272; 78 L. T., 416; 46 W. R., 442.

[4] 56 & 57 Vict., c. 53, sec. 16, re-enacting 37 & 38 Vict., c. 78, sec. 6. A bare trustee means a trustee who has no active duties to perform (*Christie* v. *Ovington* (1876), 1 Ch. D., 279; *Re Cunningham & Frayling* (1891), 2 Ch., 567; but see also *Morgan* v. *Swansea* (1878), 9 Ch. D., 582, and *Re Docwra* (1885), 29 Ch. D., 623).

[5] *Re West & Hardy* (1904), 1 Ch., 145; 73 L. J., Ch., 91; 89 L. T., 579.

shews she is a trustee, yet if the debt is paid off and the reconveyance is taken at a later date, she can reconvey as a *feme sole*, for she became a bare trustee as soon as paid off[1]. If a married woman is a trustee of personal property, the position was formerly a very peculiar one. At Common Law, nothing could have been done with regard to it without her husband joining, and he could indeed have dealt with it by himself. The Married Women's Property Act 1882[2] indeed provided that a married woman who was an executrix, or administratrix, or a trustee, could by herself transfer certain deposits in savings banks, annuities, stocks, funds, and shares, without her husband joining, as if she were a *feme sole*. But this enactment did not contain any reference to either leaseholds, or furniture, and it therefore appeared, as to such property, or indeed any other property not comprised in the enactment, that a married woman trustee could not dispose of it without her husband either joining, or, at any rate, assenting to the disposition. Probably, however, if the husband stood by, and allowed the wife to make a disposition, he would have been bound by it on principles of equitable estoppel. Now, however, by the Married Women's Property Act 1907[3] it has been enacted that a married woman is able, without her husband, to dispose of real or personal property vested in her as trustee or personal representative as if she were a *feme sole*, and that all such dispositions made by her since 1882 shall be deemed valid.

Act of 1907.

Power of sale may include a power to mortgage.

A trustee who has a power to sell the property usually has this power vested in him with a view to the convenience of the estate, or for the purpose of

[1] *Re Howgate & Osborn* (1902), 71 L. J., Ch., at p. 282.
[2] 45 & 46 Vict., c. 75, sec. 18.
[3] 7 Edw. VII., c. 18, sec. 1.

realizing and dividing the trust property, and winding up the whole of the affairs connected therewith. Sometimes, however, the object of a power of sale conferred upon a trustee is to enable him to raise a sum of money charged on the land, and if this is the case, the power of sale is deemed also to include a power on his part to mortgage the property[1].

Acceptance of trust.

It is usual for a trustee to whom land is conveyed *inter vivos*, to execute the deed for the purpose of shewing that he has accepted the trust. It is not, however, strictly necessary, as his acceptance may be shewn from other circumstances, *e.g.*, his entering into possession and proceeding to act in accordance with the deed. As regards trusts created by will, acceptance of the trust can only be shewn from the trustee's conduct, unless, indeed, he is also appointed executor, when, if he proves the will, he is deemed to have accepted the trust[2]. But until a trustee has accepted the trust he may disclaim, for no man can be compelled to take property conveyed to him by deed or will, whether for his own benefit or as a trustee, against his will. A disclaimer is usually, but not necessarily[3], by a deed poll; it should be absolute, it is irrevocable, and it cannot be of part only of the property[4]. It simply states that he disclaims the office of trustee and all estate in the trust property, and all powers and trusts created by the settlement, and it must not purport to convey or release the trust property[5]. Where a trustee has

Disclaimer

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[1] *Page* v. *Cooper* (1853), 16 Beav., 396.

[2] Lewis on Trusts, 217. But if copyholds are devised to three trustees, who are also executors and all prove the will, it has been held that two of the trustees can disclaim the devise of copyholds, and the lord can then be compelled to admit the other trustee singly (*Wellesley* v. *Withers* (1855), 4 E. & B., 750; *Bence* v. *Gilpin* (1868), L. R., 3 Ex., 76).

[3] *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D., 436; 60 L. T., 369; 37 W. R., 387.

[4] 2 Prideaux, 219.

[5] Ibid., 218, 436.

once accepted a trust he cannot afterwards disclaim, though he may, under certain circumstances, retire[1]. If one of several trustees disclaims, the whole estate vests in the others; and if they all disclaim, or a sole trustee disclaims, the legal estate will still be in the creator of the trust if he is living, and if he is dead, in his executor or administrator, unless it is copyhold property, when it will be in his devisee or heir[2].

Trustees must not make a profit.

A trustee must not make any profit out of his trust estate, and, therefore, if he is a solicitor he has no right to charge for professional work which he does in connection with selling, mortgaging, or otherwise acting in the trust[3]. Where, however, one of several trustees is a solicitor, he may be employed to act in any litigation concerning the trust, and may charge his ordinary costs, but this does not apply to business out of Court, *i.e.*, to conveyancing and other ordinary business, as opposed to litigious work[4]. The reason for this distinction is, that the exception was originally established with regard to litigious business, and the Court has refused to extend it. It is, however, not uncommon for the trust instrument to expressly confer remuneration on the trustee, especially if he be a professional man.

Craddock v. *Piper*.

Breaches of trust.

The equitable owner (*cestui que trust*) has a right against the legal owner (trustee) to compel him to do his duty, and when he is but a bare trustee to convey the legal estate to him. A trustee is liable to a *cestui que trust* for all breaches of duty on his part, but to a certain extent the Statute of Limitation now protects him, it being provided by the Trustee Act

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[1] Ante, p. 61.
[2] *Re Birchall*, *Birchall* v. *Ashton*, ante, p. 71.
[3] Indermaur & Thwaites' Equity, 101, 113, 116.
[4] *Craddock* v. *Piper* (1867), 15 L. T., 61.

1888[1] that as regards any proceedings commenced after 1st January, 1890, the rights and privileges conferred by any Statute of Limitation shall be fully enjoyed by trustees, except where the claim is founded on fraud, or fraudulent breach of trust, to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or converted to his use. In addition to this, trustees can often shelter themselves under the maxim *Vigilantibus non dormientibus æquitus subvenit*[2]. Trustee Act 1888.

Finally, it should be noticed that by the Land Transfer Act 1897[3], in the case of every death after 1897, there is necessarily a trusteeship of all real estate (excluding copyholds) of which the deceased died possessed, unless some other person had the right to take it by survivorship. It has always been the law that personalty must vest, in the first instance, in the executor or administrator of the deceased, who holds it firstly for payment of debts, and then for the persons beneficially entitled. In a sense, then, there may be said to have always been a trusteeship of personal property on death; but it never was so with regard to real property, for that used to vest directly in the devisee or heir, as the case might be. Now, however, like personal property, freeholds vest firstly in the executor or administrator, who may sell for payment of debts, though if there are several executors or administrators, some or one of them only cannot make a good title without the Court's sanction, in which respect the position of executors (not administrators) is different to what it is with regard to personal property, for there the executors' powers are joint and several. If there are two executors, and one takes probate, power being Land Transfer Act.

Re Pawley.

[1] 51 & 52 Vict., c. 59, sec. 8.
[2] Indermaur & Thwaites' Equity, 104, 105.
[3] 60 & 61 Vict., c. 65 (Part I).

reserved to the other to prove later, the one who has proved cannot convey freeholds (though he can leaseholds) without an order of Court[1]. But if one executor proves the will after the renunciation of the other, he can convey freeholds without an order of Court. If the freehold property is not required for payment of debts, then the executor must either assent to any devise that has been made of the property or convey to the devisee; but the administrator must convey to the heir. Until this is done, is seems that here we have a legal and an equitable owner of the land.

We shall hereafter, in considering practically the subject of conveyances, settlements, and wills, have occasion incidentally to further consider the foregoing, and also some other matters in connection with the subject of trustees. So far, however, an attempt has been made to deal with trustees generally in the light of legal owners as distinguished from equitable owners.

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[1] *Re Pawley & London and Provincial Bank* (1901), 1 Ch., 58; 69 L. J., Ch., 6; 81 L. T., 507.

CHAPTER IV.

ESTATES AND INTERESTS IN PROPERTY NOT IN POSSESSION.

Estate or interest.

THE expression "estate or interest" in property is a very wide one. We have so far considered it with regard to duration, with regard to the number and connection of the parties, and with regard to whether it is legal or equitable. We have next to consider it with regard to the time of enjoyment. Every estate or interest so far dealt with has been treated as if it were enjoyed in possession, but all of them are capable of being also only existent in a future sense. A man may have an estate or interest in property after another has enjoyed it, and all such rights are said in their nature to be incorporeal as opposed to interests in possession which are styled corporeal. This distinction between corporeal and incorporeal property will be treated of separately in the next chapter, and abandoning, therefore, for the present, those expressions, we have now to consider the various future estates and interests that may be held in property.

Originally only one owner.

It has been observed that "the first thing that the student has to remember about our land law is that in the beginning it recognized one person only, the person feudally possessed or seised, but now our land law has for many centuries also recognized interests in land which do not fulfil the requirements of a legal estate in possession"[1]. As to personal property, also, there was originally no such thing

[1] Jenks, 92.

as separate and distinct interests in that, the idea being absolute ownership; but, as has been pointed out[1], limitations were also there in course of time permitted, very similar in their nature to those recognized as capable of being held in real property. Yet there is no perfect analogy between the holding of realty, and of personalty; and it is only usual to apply the expressions, reversion, remainder, and executory interest, to real property, and these are the future estates in land which we have here to consider. Nevertheless, in personalty there may be very similar interests; we talk, as regards personalty, of reversionary interests, and of executory bequests and gifts. If A lets out to B a house of furniture at a certain rent, he may in a popular sense be said to have the reversion to such furniture, *i.e.*, he has the right to possession when the period of letting has expired. If trustees are directed to hold £1000 upon trust to invest it, pay the income to A for his life, and then hand over the whole fund to B, it is practical sense to say that B has a remainder; but B's right is here usually described by the vague and general expression "reversionary interest," which means that he has an interest not at present in possession. If a leasehold house is bequeathed to A, but if a certain event happens then the house is to go to B, this is practically an executory interest possessed by B. In fact, looking at the matter in its widest sense, we might even say that in all cases of bailments there is something in the nature of a future or reversionary interest existing in the bailor, for he has not possession though he may have it hereafter.

Reversions.

To understand the idea of a person being entitled to a reversion in land, we have first to recognize

[1] Ante, p. 10.

that there may be estates of different duration in land, viz.: A fee simple estate, a fee tail estate, a life estate, and an estate for years. Where a person having an estate in land alienates for a smaller estate or interest, he must have something left in him. The portion that he disposes of is called the particular estate, and what remains in him is called his reversion. A reversion, therefore, naturally arises by the act of the law, it cannot be avoided, and there is existing between the reversioner and the owner of the particular estate something in the nature of tenure. Thus A having a fee simple estate grants out to B an estate for his life, here A has the reversion in fee simple. If X has a twenty-one years lease of land, and he grants out to Y a term of seven years, here X has a leasehold reversion. In both cases the property must revert back in course of time; A in the one instance, and X in the other, has during the continuance of the particular estate no interest in possession, but he has *in futuro*.

Essential feature.

The essential feature of a reversion is the granting out of an estate by a person who has himself a greater estate than that which he grants out. If, A having a fee simple estate, grants out to B a fee tail estate, A has left in him the reversion in fee simple, though it is not a valuable reversion, because B can bar the entail and destroy it[1]. But if A having a fee simple estate grants out to B in fee simple, then there can be no reversion in A, because he has passed away his entire estate. In the early feudal times, however, in such a case, though A had no reversion, yet he was possessed of or entitled to a seignory or lordship. This was because the theory of early alienation *inter vivos* was subinfeudation, and each alienor constituted himself a *mesne* or intermediate

Seignory.

[1] Post, p. 162.

lord. This state of things was, however, naturally injurious to the interests of the chief lords, and, therefore, in the year 1290 they procured the statute of *Quia Emptores*[1], which specially provided that from thenceforth every fee simple owner could alienate his fee simple at pleasure, but that the alienee of the fee simple should be deemed to hold of the chief lord, and subject to the same services, as his grantor held before him. Thus the practice of subinfeudation was abolished, and with it the right of a subject to create a manor, for that (as we have seen) needs at least two freehold tenants in fee simple holding of the lord. So there can be no creation of a seignory at the present day, save in the case of a grant by the sovereign. If a man alienate his fee simple estate in land he passes away every atom of interest he has in it, but if he alienate something less than he has, there is left in him a reversion. The present-day incidents annexed to a seignory created before the statute of *Quia Emptores*, are the rights to demand an oath of fealty (never exacted), the right to compel attendance at the court baron of the manor, the possible right to a quit rent of small value, and to a relief of one year's quit rent on death of the tenant, and a right to escheat, which seldom accrues.

Quia Emptores.

Modern incidents of a seignory.

Primarily a reversioner has to wait until the particular estate comes to an end before he can derive any benefit from his interest in the property, unless he has reserved a rent, when, of course, during the existence of his reversion he receives such rent. But it is also quite possible for the relationship of reversioner and particular owner to cease to exist by merger, *i.e.*, by the reversioner in some way acquiring the particular estate, or the owner of the

Merger.

[1] 18 Edw. I., c. 1.

particular estate in some way acquiring the reversion. Thus A, a fee simple owner, grants out a lease to B for 60 years, and B dies, bequeathing his lease to A. Here A has not two separate estates or interests, but the term of years is swallowed up, or merged, in the fee simple. It is a general principle of law that where a less estate and a greater estate vest in the same person, without any intermediate estate, the less estate is immediately annihilated or merged[1]. To this rule there are two important exceptions: (1) There is no merger where the two estates are held in different legal (or, since the Judicature Act 1873,[2] equitable) rights, *e.g.*, where a tenant for years dies and appoints the immediate reversioner his executor; (2) There is no merger of an estate tail, for this is impossible because of the statute *De Donis*, which provides that an estate limited to a person and the heirs of his body shall go *per formam doni*. Important consequences may ensue from this. Thus, suppose A, being possessed of Whiteacre in fee simple, grants an estate tail therein to B. Then A dies leaving all his property to B, so that the reversion passes to B. B may well consider that he has the entire estate in Whiteacre, and so he has; but he has two distinct estates, and not merely an estate in fee simple, for there is first the estate tail to be worked out. Suppose B dies having by his will devised Whiteacre absolutely to his widow. If B left a son as well as a widow, the widow will only get the reversion in fee simple, and the estate tail will descend to the son, who can bar it, and defeat his mother's interest altogether. If, however, B when he

Exceptions.

[1] The difference in value between a tenancy in common and a joint tenancy is so small, and of so unsubstantial a character that it will not prevent an equitable interest in common merging in a commensurate legal estate in joint tenancy (*Re Selous*, *Thomson* v. *Selous* (1901), 1 Ch., 921; 70 L. J., Ch., 402; 84 L. T., 312).

[2] 36 & 37 Vict., c. 66, sec. 25.

died had no issue, then, the entail having come to an end, the widow would get the whole estate in Whiteacre.

No merger of a base fee;

It may also be noticed that there is strictly no merger of a base fee by the acquirement of the ultimate remainder in fee simple, but the base fee (instead of being merged) is enlarged into a fee simple absolute[1]. And with regard to tithes there is by the Common Law no merger by the acquirement of the land out of which the tithe issues, but they remain distinct properties. However, under the Tithe Acts, the owner in possession of a fee simple or fee tail in tithe rent-charge, or a person with power of acquiring or disposing of the fee simple therein, or a tenant for life in possession of the land and the tithe rent-charge thereout, can merge the tithe rent-charge in the land, by deed, with the consent of the Land Department of the Board of Agriculture, subject to this, that all charges on the tithe, or tithe rent-charge, which are thus merged, are still to have priority over any charges on the lands at the time of the merger[2].

Or tithes.

A double reversion.

It is quite possible that there may be a reversion on a reversion, if one may use such an expression. Thus, if A, having a fee simple estate, grants to B for 60 years, and then B underlets to C for 21 years; here B has the reversion as between himself and C, whilst A has, as between himself and B, the superior reversion. A's right to receive any of the incidents of the holding—*e.g.*, rent—from B depends upon the existence of his reversion, and B's right to receive the incidents of the sub-holding that he has created depends upon the

[1] Post, p. 164.

[2] 2 & 3 Wm. IV., c. 71, sec. 71; 1 & 2 Vict., c. 64; 2 & 3 Vict., c. 62; 9 & 10 Vict., c. 73, sec. 19.

existence of his reversion. Now, at Common Law, if a reversion were displaced or destroyed, the incidents of the reversion were lost. Thus, if in the above example, during the pendency of C's lease, B surrendered his term to A, who granted him a new term instead, C would hold for the residue of his 21 years without paying any rent. This particular injustice occurred so often in the case of leases surrendered in order to be renewed, that the law was first altered as regards that point alone[1]; but occasionally injustice occurred in other cases as well. Thus, even after this enactment, if in the above example A devised his fee simple to B, a merger would take place of B's leasehold interest, and the result would be that as the original reversion to C's term was no longer existing, C would hold for the residue of such term without paying any rent. This, however, is no longer so, as it is provided by the Real Property Act 1845, in general terms, that where the reversion expectant upon any lease shall be surrendered or merged, the estate which shall for the time being confer the next vested right shall be deemed the reversion expectant on the lease[2]. In such a case now, therefore, C would go on paying his rent to B, notwithstanding the displacement, or extinguishment, of the original reversion.

Destruction of reversion.

Real Property Act 1845

Finally, in connection with the subject of merger, it may be noticed that the Judicature Act 1873[3] now provides that there shall be no merger by operation of Law only, of any estate the beneficial interest in which would not be deemed to be merged in Equity, and thus the strict common law rule as to merger has been much modified, though only in a

Judicature Act 1873, as to merger.

[1] 4 Geo. II., c. 28.
[2] 8 & 9 Vict., c. 106, sec. 9.
[3] 36 & 37 Vict., c. 66, sec. 25 (4).

way in which it had already been modified by the doctrines of the Court of Chancery.

It has been pointed out that a reversion arises by the granting of any estate of less duration than that possessed by the grantor; but it is comparatively not often that a person simply grants out a particular estate of freehold, for where he grants such a particular estate, we generally find him also disposing of the *residuum*, and thus creating a remainder. Not altogether infrequently, however, a lease is granted for a life or lives, or for a period of years dependent on the continuance of a life or lives; and, when this is so, we sometimes see a right of renewal as the lives drop, and in the same way a lease may be simply for a period of years with a right of renewal on certain terms. Such interests as these are denominated, generally, renewable leaseholds; and a covenant for the perpetual renewal of a lease, if entered into by a fee simple owner and clearly so expressed, is valid and a recognized exception to the perpetuity rule[1]. However, the most usual case of a reversion occurs where an ordinary lease is granted, and as we shall have hereafter to deal practically with the subject of leases[2], we shall have an opportunity of there further considering the respective rights and positions of the reversioner and the owner of the particular estate, or, as they are styled, the lessor and the lessee.

Renewable leaseholds.

Remainders.

To understand the nature of a remainder in land, we have but to recognize that a person who is capable of causing a reversion to arise, as it must by operation of law when he simply grants out a particular estate, can at the time, instead of retaining

[1] *City of London* v. *Mitford* (1807), 14 Ves., 41; *Job* v. *Bannister* (1857), 26 L. J., Ch., 125; *Hard* v. *Burges* (1857), 4 K. & J., 45; *L. & S.W. Ry. Co.* v. *Gomm* (1882), 20 Ch. D., 579.

[2] Post, Chap. XIII.

the *residuum* of his ownership, grant it away to another person. If he does, this said last-mentioned person is styled a remainderman, and he has what would have been a reversion in the original grantor. For this *residuum* of the estate to be a remainder, however, it is necessary that the grant should be made by the same instrument as that which creates the particular estate. Thus if A being a fee simple owner, grants to B for life, and then the next day conveys the fee simple to C, subject to B's life estate, C has not got a remainder, but is the assignee of the reversion, which is quite capable of being thus transferred to him by A. This is not altogether a distinction without a difference, for it must be remembered that there is tenure existing as between the reversioner and the owner of the particular estate, but that there is no such relationship between the remainderman and the owner of the particular estate. Whilst, therefore, a reversion is that estate which naturally remains in a person when he only grants out a particular estate, a remainder is that estate which is created by the granting of the residue, or a part of the residue, after the granting of the particular estate, but by the same instrument. It is quite possible that there should be existing not merely a particular estate and a reversion, or a particular estate and a remainder, but there may be a particular estate, a remainder, and a reversion in the same property, *e.g.*, if X has a fee simple, and grants to A for life and at his death to B in tail, here A has a particular estate for life, B a remainder in tail, and X has left in him the ultimate reversion in fee simple. In all cases it is correct to say that a reversion arises by the act of the law, and a remainder arises by the act of the party.

Definitions of a reversion and a remainder.

It is perhaps wise to follow the old beaten track, and say that there are three rules necessary to be

Three rules for creation of remainder.

observed for the creation of all remainders: (1) There must be some particular estate precedent to the estate in remainder (which is only common sense). (2) A remainder must pass out of the grantor at the time of the creation of the particular estate, *i.e.*, must be created by the same instrument as the particular estate (this has just been explained). (3) A remainder must be limited to take effect in possession immediately upon the determination of the particular estate—*e.g.*, if there is a grant to A for life, and then a day after his death to B in fee simple, this last is not a good remainder[1]. This last rule savours very much of the feudal notions, is of very ancient origin[2], and deserves a little examination. The rule of the Common Law founded upon feudal ideas was, that the fee must never be in abeyance. If a particular estate is given and then the fee simple, it is not possible that the fee should be in abeyance, but if there is any intervening period, however small, then it would be otherwise. The rule, therefore, in its origin was sound enough, and, as it has never been altered, it must remain the same to-day, and, strange as it may appear, if a common law grant is made to A for life, and then a day after his death to B in fee simple, this last grant is altogether bad, and cannot take effect in any way. But this is only true as regards a common law grant, for such a grant may effectually be made by the agency of uses in a deed, or by force of giving effect to a testator's intention in a will. Thus, an estate can be effectually granted to the use of A for his life, and then a day after his death to the use of B in fee simple, or there may be a similar limitation by will even without the agency of uses. The student will better understand this when he has considered the subject

[1] 1 Stephen's Commentaries, 213.
[2] *Barwick's Case* (1597), 5 Rep., 93.

of executory interests, a mode of limitation possessing a flexibility which does not exist in a common law grant.

Rule in *Shelley's Case.*

Having got these three rules before us, and recognizing that whenever, by the same instrument, an estate is granted as regards a particle of its duration to one person, and then to another or others, a remainder is created, we find what may be regarded as an exception, which is, indeed, styled a rule in itself, viz., the rule in *Shelley's Case*[1]. Suppose an estate is granted to A, and at his death to his heirs, or the heirs of his body; this would primarily seem to import that A was to have a life estate, and then his heirs were to take by way of remainder. Still more would this seem to be the case if an estate is made to intervene between the limitation to A, and the limitation to his heirs, or the heirs of his body—thus, to A for life, then to B for life, and then to the heirs (or heirs of the body) of A. Yet in neither case does the heir take by way of remainder, the word "heirs" or the words "heirs of the body" being construed as simply marking out the estate A is to take, in the one case a fee simple, and in the other a fee tail, although when there is an intervening estate between the first limitation and the ultimate one, the estate of A is subject to that intervening estate. The rule in *Shelley's Case* is thus expressed: Where by any deed or will an estate is given to any person for life, and by the same instrument an estate is limited (either mediately or immediately) to his heirs, or the heirs of his body, the word "heirs" is a word of limitation and not of purchase, so that the person himself gets the fee simple or fee tail. The heir, or heir of the body, may, and in fact will, take if the ancestor dies

[1] (1581) Tudor's Conveyancing Cases, 332.

intestate possessed of the estate, but the ancestor has a full power of disposition over the property[1].

Reason of rule in *Shelley's Case*.

Many different reasons have been given for the rule in *Shelley's Case*[2], but it is here submitted that it is not necessary to go beyond the idea of feudalism. The case itself was decided in Elizabeth's reign, but it was manifestly the repetition of a well-established doctrine. The true original feudal estate was the life estate, but, as we have seen, it became extended by a grant to "heirs." The whole point was, how the heir took. If he took under an independent limitation, then the existence of the independent estate would deprive the lord of the chief fruits of his seignory, but if the heir only took by descent from the ancestor, then it would be otherwise. The influence and power of the lords were great, and the true way of looking at the rule is to regard it as introduced to prevent frauds on tenures, for if the heir or heir of the body of the ancestor had been held to take by purchase, he would not upon the death of the ancestor have been liable to the burthens imposed upon a descent; or the lord might have been prejudiced by the loss of wardship, marriage, and other fruits of tenure[3]. The rule is a firmly settled one, and certainly now admits of no argument or discussion whatever. vide, explanation in Topham.

Milman v. *Lane*.

The rule is applied strictly. Thus, if freeholds are devised to A for 99 years, if he shall so long live, and then to his heirs, A does not get the fee simple, for no life estate is given to him, but only a term of years[4].

[1] *Re Younan's Will* (1901), 1 Ch., 934; 70 L. J., Ch., 591; 84 L. T., 456.

[2] Tudor's Conveyancing Cases, 339, 340.

[3] Tudor, 339; *Van Grutten* v. *Foxwell* (1897), A. C., 658; 66 L. J., Q. B., 745; 77 L. T., 170.

[4] *Milman* v. *Lane* (1901), 2 K. B., 745; 70 L. J., K. B., 731; 85 L. T., 180.

Personalty.

The rule in *Shelley's Case* being a rule of tenure, it naturally has no application to personal property. Yet, with respect to personal property, a somewhat analogous rule has sprung up, by which, if personalty is settled in trust for A during his life, and after his decease in trust for his executors, administrators, and assigns, A will be entitled absolutely[1].

Remainder by implication.

To say that a remainder must arise by reason of an express grant is quite true in the case of a deed, and generally, but not always, in the case of a will. As to a will, the intention of the testator being the principal point to be observed, it is quite possible to find a remainder existing by implication. Thus, take the case of cross-remainders. A cross-remainder may be defined as a reciprocal contingency of succession, arising on a disposition of lands to two or more persons, each having a remainder over in the estate of the other. There can be no cross-remainders in a deed except by express limitation, but in a will cross-remainders may arise by implication. Thus, if Blackacre is devised to A in tail, and Whiteacre to B in tail, and if they both die without issue then to C in fee simple, here A and B have cross-remainders by implication, so that on the failure of the issue of either, the other, or his issue, will take the whole, and C's remainder over will be postponed until the issue of both has failed[2].

Cross-remainders.

Vested and contingent remainders.

Having dealt with remainders generally, the next thing is to distinguish between a vested and a contingent remainder. If the estate limited in remainder is always ready to come into possession directly the particular estate determines, then it is styled a vested remainder; but if it is not so ready, *i.e.*, if it is limited to an uncertain person, or upon

[1] See further, Chap. XVI.
[2] 1 Stephen's Commentaries, 406.

an uncertain event, then it is styled a contingent remainder. Thus, if land is limited to A for life, and at his death to B in fee simple, B has a vested remainder. It is true B may die before A, but that does not matter, B has the estate in fee simple subject to A's prior life estate, and B can dispose of his remainder before it actually falls into possession. But if land is limited to A for life and then to B in fee simple if he shall return from New Zealand, this is a contingent remainder, for perhaps B may never so return. Vested remainders, and contingent remainders, were allowed at a very early period, but vested remainders came first, and there appears to have been some hesitancy in the allowance of a contingent remainder, for firstly there would be the possibility of the fee being in abeyance, and secondly the limitation in its very nature presented no certainty, but merely a possibility.

Two rules as to contingent remainders.

The courts of law did however allow of a limitation of land by way of contingent remainder, but subject to two rules: (1) The feudal possession must never be without an owner; (2) There must be no possibility limited upon a possibility.

Rule 1. Explanation.

1. *The feudal possession must never be without an owner.* If an estate was granted to A for 21 years, and then to B in fee simple, this was a perfectly good limitation, for though as between each other there was a particular estate and a remainder, yet B was at once regarded as the feudal possessor. This followed from the original notion of the position of a leaseholder, who was regarded merely as a bailiff of the land, and not as a person having an actual estate therein. But a grant to A for 21 years, and then to B in fee simple if he should return from France, would not be good as regards the remainder, because it would, in effect, be placing the fee in abeyance.

The rule, therefore, as we have briefly expressed it, must, with a view to understanding it, be amplified by saying that no contingent remainder of freehold can be good unless it is preceded by a particular estate of freehold, and further the contingency must cease to be a contingency before the particular estate comes to an end. If this is not the case, then the contingent remainder must fail. This is a plain and reasonable feudal rule, and we may proceed most usefully to work it out, and bring ourselves down to modern times, by means of an illustration.

Illustration.

Grant to A for life, remainder to the eldest son of B who shall attain 21 (there being no such son at present), for his life, remainder to C in fee simple. Here we have a particular estate in A, a contingent remainder to the son of B, and a vested remainder in C. This is a perfectly good limitation all through. But suppose, in any way, A's life estate determines before B has a son of the prescribed age, then we find the contingent remainder failing, and C at once stepping in and taking the estate in fee simple. A's life estate might determine regularly by his death, or irregularly by a forfeiture, or by merger, *e.g.*, if A committed treason, or surrendered his life estate to C. In any of these events, there being then no son of B who had attained 21, the contingent remainder must fail.

Preventing the failure of a contingent remainder.

A limitation by way of contingent remainder is no out-of-the-way thing, for, as we shall see hereafter more fully[1], in every strict settlement of real estate there is a contingent remainder. The common limitation in such a settlement is to the husband for his life, and then to his first and other sons in tail, which latter limitation is of course a contingent

[1] Post, Chap. XV.

remainder. It was necessary therefore, in settlements of this kind, to find some method of preventing the failure of the contingent remainder by reason of the sudden and irregular determination of the prior particular estate. The point of its regular determination was naturally of no consequence, for a posthumous child was considered as if born[1], and if at the death of the parent there was no child either in actual existence, or in *ventre sa mere*, there, of course, could never be one. The method resorted to by conveyancers was to insert in such a settlement a limitation to trustees of an estate sufficient to comply with the feudal rule, to take effect if the particular estate determined in any irregular manner. This was styled a limitation to trustees to preserve contingent remainders[2]. This became a common form part of every strict settlement of realty, and continued to be so until the Real Property Act 1845 was passed[3], which in this respect can only be regarded as shortening the form of such settlements. This Act provides[4] that a contingent remainder shall be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

Posthumous children.

Real Property Act 1845

Insufficiency of this Act.

This enactment, therefore, did all that was required as regards a strict settlement of real estate, in which a contingent remainder was most frequently to be found; but it did not do complete justice. We will revert to our example, and suppose that A dies before B has a son aged 21, here the contingent remainder would still fail. To meet such cases as

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[1] *Reeves* v. *Long*, 4 Mod., 282; 10 & 11 Wm. III., c. 16.
[2] See further, 1 Stephen's Commentaries, 219.
[3] 8 & 9 Vict., c. 106.
[4] Sec. 8.

this, therefore, the Contingent Remainders Act 1877[1] was passed, which provides that in future every contingent remainder which would have been valid had it been created as an executory interest shall, if the particular estate determines before its vesting, be capable of taking effect as an executory limitation. In other words, a limitation may be in fact a contingent remainder, but, if we find it fails to take effect because it is not ready to vest when the particular estate comes to an end, we have then to examine it and ask whether it could have been validly created as an executory interest, and if we can give an affirmative answer to the question then it is preserved. As will be seen hereafter, an executory interest is valid if it is limited to take effect within a life or lives in being and 21 years afterwards. Referring again to our illustration, we see that the interest of A might have been made to arise in this way: to the use of A in fee simple, but if and when B shall have a son who attains 21, then to the use of that son in fee simple, which would be a valid executory interest. If, therefore, in our illustration A dies before B has a son of the age of 21 years, though the limitation fails as a contingent remainder, it is preserved by the Contingent Remainders Act 1877, and will take effect as if the limitation had been by way of executory interest, *i.e.*, on B's son attaining 21 he will then take. Suppose, however, to again refer to our illustration, we make the limitation to A for life with remainder to the eldest son of B who shall attain 22, here the Act referred to is of no assistance. The limitation is a good contingent remainder, but, if it takes effect at all, it must do so as a contingent remainder, and if A dies before B has a son aged 22, it fails as a contingent remainder, and there is nothing in the Act to preserve it.

Contingent Remainders Act 1877.

[1] 40 & 41 Vict., c. 33. The Act applies to limitations in all instruments executed since 2nd August, 1877.

A contingent remainder does not tend to perpetuity.

It should be noticed that a contingent remainder in its ordinary and proper mode of limitation cannot have any tendency to perpetuity[1], because it must, if it takes effect at all, come into existence during the continuance of the prior particular estate. There is, therefore, no need to further restrict it. Thus, where there is a grant to A for life, with remainder to the first son B may have, who shall attain the age of 40—this is theoretically a good limitation, because it must vest (if it ever does) at the death of A, only if A dies before B has a son of the prescribed age, the contingent remainder thus limited must necessarily fail. It must be borne in mind that a contingent remainder is an estate or interest in land quite distinct from the more modern executory interest, which is presently dealt with, and that the rules regulating the creation and existence of each are also distinct[2].

Rule 2.

2. *There must be no possibility limited upon a possibility.* In other words, while a contingent remainder was allowed to be good, although there was but a possibility of its taking effect, the law would not go further than this—it would permit of a common possibility, but not of a double possibility. It is very doubtful whether much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility[3]. Probably it is more accurate to say, that when once the law had established that the right of alienation was incident to the ownership of an estate in land, the judges were obliged, to maintain this right, to give effect as to a principle of legal policy to a rule that the liberty of alienation should not be exercised to its own

Possibilities.

[1] As to perpetuities, see post, pp. 104-111.

[2] *Whitby* v. *Mitchell* (1890), 44 Ch. D., 85; 59 L. J., Ch., 485; 62 L. T., 771.

[3] Farwell, J., in *Re Ashforth* (1905), 1 Ch., 535; Grey on Perpetuities, 86.

destruction. Hence the policy of the law will not allow a man to create a perpetuity, or so contrive to dispose of his property that it shall remain for ever out of reach of the exercise of the power of alienation[1]. Applying this principle to contingent remainders, the judges laid down the rule that if an estate is given to an unborn person for life, any remainder to any child of such unborn person is void[2]. Thus an estate could be limited to A, a bachelor, for life, with a remainder to the first son he might have, but it could not be limited by way of further remainder to the son of such son[3], and any such further contingent limitation would be void; and in 1889 it was further laid down that this rule applies even if it is provided that the grandchild must be born within the life of A and 21 years longer, and consequently the limitation cannot transgress the perpetuity rule which governs limitations by way of executory interest[4]. And it has now been held that this rule—that a limitation of realty to the children of an unborn person, following a life estate to such unborn person is void—applies to equitable as well as legal limitations of realty[5]. Such is still the case at the present day as regards a limitation by deed; and further it should be noticed that any limitation of a remainder subsequent to the void limitation is also void[6]. The strict rule, however, that an estate cannot be limited to the child of an unborn person

Remainder to child of unborn person.

Whitby v. *Mitchell.*

Re Nash.

[1] Encyclopædia of Laws of England, 519.

[2] *Marlborough* v. *Godolphin* (1759), 1 Eden, 415, 416.

[3] *Spencer* v. *Duke of Marlborough* (1763), 3 Bro. P. C., 232.

[4] *Whitby* v. *Mitchell* (1890), 44 Ch. D., 85; 59 L. J., Ch., 485; 62 L. T., 771. But this rule in *Whitby* v. *Mitchell* does not apply to personalty. Thus personalty may be given in trust for a bachelor for life, and then in trust for his children for life, and then in trust for such of his grandchildren as are born before the end of 21 years from his death (*Re Bowles, Amedroz* v. *Bowles* (1902), 2 Ch., 650; 71 L. J., Ch., 822; 51 W. R., 124); for these limitations do not transgress the perpetuity rule, post, p. 104.

[5] *Re Nash, Cook* v. *Frederick* (1909), 78 L. J., Ch., 657; 101 L. T., 153.

[6] *Brudenell* v. *Elwes* (1802), 1 East., 442; *Whitby* v. *Mitchell*, supra.

Cy-près doctrine in wills.

is not always followed in the case of a will, for there, if a devise to the unborn person for life is followed by a devise to the child of such unborn person *in tail*, the Court holds that the unborn person takes an estate tail, because in a will the intention of the testator is to be observed more than direct feudal rules, and if the entail is not barred the child of the unborn person will in due course take. This is styled the "*cy-près* doctrine," and it only applies where the last limitation is in tail[1]. Thus, if an estate is limited, even by will, to A, a bachelor, for life, with remainder to his first son for life, with remainder to that son's son in fee simple, this last limitation is simply void.

Re Frost.

In 1899 the further rule was laid down that in the limitation of successive contingent remainders, the second or any subsequent contingent remainder is void *ab initio* if it might fail to vest within the rule which governs executory interests, *i.e.*, within a life or lives in being and 21 years longer. Thus, if land be limited to a bachelor for life, and then to his first son for life, and after the son's death to the bachelor's eldest daughter *then* living, the remainder to the daughter is void, for the bachelor might leave a son who would survive him more than 21 years, and then the daughter to take would not be ascertained within 21 years after the bachelor died[2]. But this rule does not apply if the preceding contingent remainder is an estate tail, for in this case the second contingent remainder may be defeated by barring the preceding entail.

Contingency with a double aspect.

But there is nothing to prevent one contingent remainder being limited *in substitution* for another

[1] *Re Richardson* (1904), 1 Ch., 332; 73 L. J., Ch., 159.

[2] *Re Frost* (1899), 43 Ch. D., 246; 59 L. J., Ch., 118; 62 L. T., 25; followed in *Re Ashforth* (1905), 1 Ch., 535; 74 L. J., Ch., 361; and in *Whitby v. Von Luedecke* (1906), 1 Ch., 783; 75 L. J., Ch., 359.

contingent remainder in fee simple, *e.g.*, where land is given to A for life, and if he have a son, then to that son in fee, and if he have no son, then to B in fee. Such remainders as these are concurrent, and not consecutive, both being remainders on the particular estate, and not remainders on each other. Such a limitation is sometimes styled a contingency with a double aspect[1].

Future and contingent interest in personalty.

The whole law with regard to remainders, and particularly with regard to contingent remainders, savours of the feudal times, and the original idea of seisin. Primarily, therefore, we have nothing to do with personal property whilst considering the subject; but it must be borne in mind, as has been explained, that there can generally be interests in personal property analogous to those that can be created in real property, and by the agency of trusts, and even without trustees, a person may have an interest in personalty *in futuro*, including an interest dependent upon a contingency. Such future interests are styled, generally, reversionary interests, and the rules we have been considering do not apply to them, but the rule hereafter referred to in considering executory interests, viz., the rule against perpetuities, is what governs them[2].

Sales of reversionary interests.

Reversions and remainders in land, and similar future interests in personalty, are quite capable of alienation. And the Real Property Act 1845[3] sanctions alienation by deed of contingent, executory, and future interests, and mere possibilities and rights of entry. Formerly, however, with regard to estates and interests not in possession, a doctrine of the Court of Chancery often avoided dispositions of them

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[1] 1 Stephen's Commentaries, 215.
[2] Post, p. 104; *Re Bowles*, ante, p. 93.
[3] 8 & 9 Vict., c. 106, sec. 6.

on the principle of constructive fraud[1]. It was, however, provided by the Sales of Reversions Act 1867[2] that no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue.

31 Vict., c. 4.

Executory interests.

An executory interest in its widest sense is a future estate or interest in property which is neither a reversion nor a remainder. There may be executory interests in either real or personal property, but it is best to consider the subject mainly as relating to land, and then to remember that practically similar interests may exist in personalty. As regards freeholds, an executory interest may be defined as a future estate arising in a deed under the Statute of Uses, or else in a will, not like a remainder waiting for the determination of a prior estate, but, on the contrary, often springing up and putting an end to a prior estate[3]. To understand the subject it is necessary to go far back into the history of the laws relating to land.

Definition.

Executory interests in land before the Statute of Uses.

We have seen that prior to the Statute of Uses land was frequently conveyed to one person to hold to the use of another, and that the use, though not recognized at law, conferred in equity the beneficial ownership, or interest, for whatever duration was expressed[4]. Suppose land was conveyed to A in fee simple, to the use of B in fee simple, but if C returned from Flanders to the use of C in fee simple; A would be the legal owner, and the only person recognized at law. At first he would have to account to B, but if C returned from Flanders, then it would

[1] Indermaur & Thwaites' Equity, 265.
[2] 31 Vict., c. 4.
[3] Williams' Real Property, 366.
[4] Ante, p. 48.

be absurd that he should go on accounting to B, and he would in future have to account to C. Here we have a true executory interest of the kind known as a shifting use, but in those days it was only the equitable use which arose *in futuro*, and it was the equitable estate which shifted from B to C, and not the legal estate. It was a highly convenient arrangement. The law was, and is, that by a common law grant no estate can be limited after a fee simple, and any such subsequent grant is absolutely void. Here, at any rate, was a way of limiting an equitable estate after a previous equitable fee simple. In fact in this way an equitable estate or interest could be caused to spring up *in futuro*. But it was only the equitable ownership which thus sprang up or shifted from one person to another.

The effect of the Statute of Uses.

Here we should have stopped had it not been for the Statute of Uses[1], which certainly produced a variety of results it was never meant to. This Act provided that whoever had the use in land should also have the legal ownership. It certainly did not invalidate a conveyance to uses, and the extraordinary but yet natural result ensued, that these future uses were by it converted into legal estates. Before the statute, it was the equitable use which sprang up, or shifted away; after the statute, the use, wherever it might be for the time, was immediately converted into a legal estate. The effect was startling, for it practically abrogated the common law rule that an estate could not be limited after a fee simple. In words the rule is still a truism, in effect it is absolutely untrue. To-day, if land is granted to A in fee simple, but if B marries then to B in fee simple, this last limitation is void, for this is a common law grant, and the common law rule must be respected. Yet

[1] 27 Hy. VIII., c. 10; see ante, p. 49.

if the land is granted to X and his heirs to the use of A and his heirs, but if B marries to the use of B and his heirs, this will be a perfectly good limitation. Neither A, nor B, takes any estate by the grant, but each has a use; at first the statute operates on the use in A, and gives him the legal fee; then B marries and the statute operates on the use in him, and gives him the legal fee, the use with its accompanying legal estate shifting away from A and vesting in B. Neither A, nor B, is in by the Common Law, but by the Statute of Uses.

Executory interests in deeds and wills respectively.

It is evident, therefore, that an executory interest as regards freehold land can only arise in a deed by the help of uses. As to copyholds, leaseholds, or other personal property, this is not the case. The Statute of Uses does not apply to copyholds at all, because the seisin is always in the lord; and it is apparent that it does not apply to any personal property. Its effect is restricted to freeholds, and as to them, as has just been stated, an executory interest can, in a deed, only arise by force of the Statute of Uses. This is not, however, so as regards a will. The Statute of Uses does not strictly apply to wills, because there the governing rule is an observance of the testator's intention, which may often be quite opposed to the strict enactment of the statute. Still, even in a will where uses are expressly and formally declared, it may often be inferred that the testator had the statute in view, and intended the conversion of the use into the legal estate, according to its known mode of operation[1]. Thus, a devise to A in trust for B gives the legal estate to B[2], and a devise unto and to the use of C in trust for D gives the legal estate to C[3]. If there is a

[1] 1 Stephen's Commentaries, 415.
[2] *Re Brooke* (1894), 1 Ch., 48, 49.
[3] Tudor's Conveyancing Cases, 308.

grant to A and his heirs, to the use of B and his heirs, but if a certain event happens to the use of C and his heirs; here B has the legal fee, and on the event happening the legal fee will shift over to and vest in C. And suppose it was a devise, then it would equally be held that B has the legal estate and that on the event happening it shifts to C.

Explanation of definition.

Let us now look back at our definition of an executory interest in land[1]. It has been stated that it is a future estate arising in a deed under the Statute of Uses, or else in a will—that is to say, in a deed uses are essential, in a will that is not the case. Then the definition proceeds to contrast an executory interest with a remainder, by pointing out that it need not wait till the prior estate determines, but, on the contrary, may spring up and put an end to a prior estate. If attention is paid to the definition, there can never be any difficulty in determining whether a particular limitation is by way of remainder, or executory interest. If there is first a particular estate given, and then a *residuum*, that must be a remainder; but if the fee simple is first given and then there is a subsequent limitation, if that is a good limitation, it must be an executory interest. It must be remembered, however, that where a limitation is a contingent remainder, but it might possibly have been created as an executory interest, then, though it is first to be construed and treated as a contingent remainder[2], yet, if it would fail as such, it is then to have effect given to it as an executory interest[3].

Different kinds of executory interests.

Some confusion occasionally exists in the minds of students as regards executory interests, by reason of the different names applied to them, for they read

[1] Ante, p. 96.
[2] *Cole* v. *Sewell* (1843), 4 Dr. & W. at p. 27.
[3] Ante, p. 91.

of executory uses and devises, springing and shifting uses and devises, and conditional limitations. Whenever the word "use" is adopted in the expression, it is usually to signify that it is an executory interest arising in a deed; whenever the word "devise" is used, it is meant that it is an executory interest arising in a will. Whenever the word "springing" is used, it is intended to signify that the executory interest is to arise without depriving a third person of any estate, *e.g.*, limitation of a power of appointment to A, and until he shall appoint to him in fee simple; whenever the word "shifting" is used, it signifies that it is an executory interest which will cause a third party to be deprived of his estate, *e.g.*, devise to A and his heirs, but if he shall not within six months adopt the testator's name and arms, then to B and his heirs. "Conditional limitation" is a vague, unsatisfactory expression, sometimes used indiscriminately to signify any conditional estate, and sometimes applied to executory interests generally, but more strictly it is where a condition is annexed to an estate in such a way that the estate can only exist during its continuance, *e.g.*, a qualified fee simple[1] or a grant to A during widowhood. Executory interests may arise, practically, as regards personalty, either by deed or by will, and may be in their nature springing, or shifting, but in considering them we have nothing to do with the doctrine of uses and the Statute of Uses.

Power of appointment in connection with land.

An important kind of executory interest in freehold land is known as a power of appointment, which has been well defined as a means of causing a use, with its accompanying estate, to spring up at the will of any given person[2]. Thus, suppose land is

[1] As to which, see ante, pp. 21, 22.
[2] Williams' Real Property, 371.

limited to such uses as A shall appoint, and in default of and until appointment to the use of B in fee simple. Here B has a fee simple in possession, but if A appoints, then the appointee takes the estate, and displaces B (in whole or in part), for as A's power had priority over B's ownership so have the uses created by A in the exercise of the power. This, then, is plainly an executory interest, and it must be noticed that the power is to appoint not the estate, but the use; and though the appointee gets the legal estate, he gets it, not by force of the appointment, but by force of the Statute of Uses. This is not merely a technical difference, and to see that this is so we may take an illustration. If land is conveyed by X to A, to the use of B, to the use of C, A takes nothing, being but a seisinee to uses, B takes the legal estate, and C the equitable estate[1]. But if X, having a power of appointment, exercises it by appointing to A, to the use of B, to the use of C, here A takes the legal estate and C the equitable estate. The instrument operates under the Statute of Uses; X has only a power to deal with the use, and in appointing to A he gives him the first use, and therefore A takes the legal estate; C, of course, as in the case of the grant, having the last use, takes the equitable or beneficial estate.

Different kinds of powers of appointment as regards land.

Powers as regards land may be classified as being either: (1) Appendant, (2) In gross, (3) Collateral. These phrases are very technical. A power appendant is where the person to whom the power is given has an estate in the land which will be affected by the exercise of the power, *e.g.*, a power of leasing given to a tenant for life. A power in gross is where a person having an estate in the land has a power to create some other estate after the

[1] See ante, pp. 49-52.

determination of his own estate, *e.g.*, a tenant for life with a power to appoint the fee simple by his will. A power collateral is one vested in a person who has no estate in the land at all[1].

Other kinds of powers of appointment.

But a power of appointment may be existing in a person quite irrespective of the Statute of Uses, *e.g.*, a power expressly conferred upon an executor to sell his testator's copyholds. Such a power is known as a common law power. Then there may be a statutory power, *e.g.*, the power vested in a tenant for life under the Settled Land Act 1882, to sell or lease. There may also be an equitable power, viz., a power to deal with or dispose of the beneficial interest in property, unconnected with the legal ownership thereof, or a power to override some rule of Equity, *e.g.*, a mortgagee's power of sale when conferred by the mortgage deed, as it enables him to extinguish the equity of redemption. Furthermore, powers of appointment may be general or special, the former being where the donee has a power to appoint to anyone, and the latter being where he has only a power of selection amongst a particular class. A consideration of the distinction between general and special powers, involving points as to excessive and fraudulent execution, belongs properly to the subject of Equity[2].

Indermaur & Thwaites' Equity, 270-275.

Extinguishment of power.

It does not follow because a person has a power of appointment vested in him, that he will ever exercise it. If he does not, then the property is said to go to some other person in default of appointment. The Conveyancing Act 1881 also provides that a person to whom any power is given, whether coupled with an interest or not, may by deed

Conveyancing Act 1881.

[1] See further, *Edwards* v. *Slater* and notes, Tudor's Conveyancing Cases, 531.

[2] Indermaur & Thwaites' Manual of Equity, 270-275.

release or contract not to exercise it[1]. And the Conveyancing Act 1882 further provides that any such person may disclaim the power, and thereafter shall become incapable of exercising it, or joining in its exercise, and that, on any such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power[2]. Both of these enactments are retrospective, and it will be observed that they apply not merely to powers of appointment, but to powers, or authorities, in the widest sense. They enable a parent, who has a power to appoint among children, to release that power[3]. But where the power is something more than a power, and is in fact a power coupled with a duty, then these enactments do not apply[4].

Conveyancing Act 1882.

We have seen that an executory interest was a mode of limitation originally quite unknown to the Common Law. There had long been the equitable use in land, but with that the Courts of Law were not concerned, and the equivalent limitation of personal property only became prominent at a later date, when the doctrine of executory interests in land had become well established. The Courts of Law were familiar with remainders, but even in the case of a contingent remainder there was never any fear of a tying up of property for a period which would be detrimental to the community. A contingent remainder has no tendency to perpetuity because it must come into existence, if at all, during

Limit for creation of executory interests.

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[1] 44 & 45 Vict., c. 41, sec. 52.

[2] 45 & 46 Vict., c. 39, sec. 5.

[3] *Re Radcliffe* (1892), 1 Ch., 227; 61 L. J., Ch., 186; 66 L. T., 363; *Re Somes* (1896), 1 Ch., 250; 65 L. J., Ch., 262; 74 L. T., 29; *Shirley* v. *Fisher* (1883), 47 L. T., 109. But see *Re Little* (1889), 40 Ch. D., 418; 58 L. J., Ch., 233; 60 L. T., 246.

[4] *Re Eyre* (1884), 49 L. T., 259.

the continuance of the previous particular estate, or *eo instanti* that it determines; and attempts to create an unbarable entail, or any other perpetuity, by successive contingent remainders, have been defeated as they arose by the rules in *Whitby* v. *Mitchell* and *Re Frost*, stated ante, pages 93 and 94. But when the Statute of Uses was passed, the Courts of Law had to deal with a new mode of creating estates, viz., by means of springing and shifting uses, carrying with them the legal estate as a result of the statute. It was evident that if no limit were laid down, the devolution of property might be tied up for a perfectly indefinite time, and the Courts, therefore, laid down a rule defining that limit, which is known as the rule against perpetuities. At first the rule was not very clear and precise, which is not to be wondered at, but at last it was laid down, once and for all, clearly and decisively, in 1833 by the House of Lords in the case of *Cadell* v. *Palmer*[1].

Cadell v. *Palmer*.

The perpetuity rule.

The rule is this, every executory interest must be limited in such a way that it must necessarily, if at all, take effect within a life or lives in being and 21 years afterwards, allowing only a further period for gestation if it actually exists. Thus to grant an estate to A and his heirs to the use of B and his heirs, but if C, a bachelor, should marry and have a son who should attain 21 then to him, would be perfectly good; if, however, the age fixed upon were 22, then it would be void as exceeding the rule, or, as it is said, void for remoteness. If no life or lives be taken as part of the period, then the rule is restricted to a period of 21 years[2], unless the gift is to a person then living[3]. The rule is applied from the date when the instrument containing the limitation first comes

[1] Tudor's Conveyancing Cases, 578.
[2] *Palmer* v. *Holford* (1828), 4 Russ., 493.
[3] *Lachlan* v. *Reynolds* (1852), 9 Hare, 796.

into operation[1]. Thus, a gift by deed to the first son of A, a bachelor, who attains 23, is void; but if the gift is by will, and A has a son 23 at testator's death, or A has predeceased the testator leaving a son, the gift is not void, as it would be in all other cases. It is a very absolute rule, and no limitation can be held good which under any possible event may exceed its limit, except that no period is too remote for the limitation of an executory estate, or interest, engrafted on an estate tail previously limited, the reason being that it is always liable to be barred by the tenant in tail, and, therefore, the remoteness of the event on which it depends does not suspend the absolute ownership so as to effect a perpetuity[2]. Any limitations dependent or expectant on a prior limitation which is void for remoteness are invalid[3], because they are not intended to take effect until the prior limitation is exhausted; but this rule does not apply to limitations in default of appointment, provided it is the intention of the settlor that they shall take effect unless effectually displaced by the exercise of such power, since, if the power is invalid by reason of the perpetuity rule, they cannot be displaced[4].

Executory interest after estate tail.

This rule against perpetuities applies both to limitations of real and of personal property, and in considering it in connection with the subject of powers, it is important to notice a distinction between general and special powers. General powers have no tendency to perpetuity, for the donee may appoint to anyone, and, therefore, the time of vesting is reckoned and the perpetuity rule is applied, not from the creation of the power, but

Perpetuity rule applies to personalty as well as realty.

Distinction as regards rule between general and special powers.

[1] *Palmer* v. *Holford* (1828), 4 Russ., 493.
[2] *Millbank* v. *Vane* (1893), 3 Ch., 79.
[3] *Hancock* v. *Watson* (1902), A. C., 14; 71 L. J., Ch., 149; 85 L. T., 729.
[4] *Re Abbott, Peacock* v. *Frigout* (1893), 1 Ch., 54; 62 L. J., Ch., 46.

from the time of its execution. Special powers, on the other hand, have a tendency to perpetuity, for the donee cannot go beyond a certain class, and, therefore, the period of vesting runs from the time of the creation of the power, that is to say, when the power is exercised no limitation can be valid unless it would have been valid had it been contained in the instrument conferring the power[1].

Legislative interference with the perpetuity rule.

The Legislature has not, however, been content to let the rule against perpetuities stand exactly as it was finally established by *Cadell* v. *Palmer*, but the interference has only been as regards income, and does not affect *corpus*. As the rule stood, a man had absolute control over both capital and income for the prescribed time, and might completely tie up his property to that extent, and thus prevent a benefit being taken by anyone for that period. This was considered contrary to the benefit of the community, attention having been specially drawn to the subject by the extraordinary will of a Mr. Thelluson, which provided for the accumulation of the income of his property for a long period, but yet kept strictly within the rule allowed for the creation of executory interests. An Act, therefore, was passed, viz., the Accumulations Act 1800, or, as it is still familiarly styled, the Thelluson Act[2]. It must be remembered, in considering this statute, that it only applies to income; it limits the perpetuity rule there, but it still leaves the rule itself intact as regards capital.

Accumulations Act 1800.

The Accumulations Act 1800 forbids the accumulation of the income of any real or personal property for longer than one of the four following periods, viz.: (1) The life of the grantor or grantors, settlor or settlors, or (2) the term of 21

[1] Tudor's Conveyancing Cases, 606.
[2] 39 & 40 Geo. III., c. 98.

years from the death of any such grantor, settlor, devisor, or testator, or (3) during the minority of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or (4) during the minority or respective minorities only of any person or persons who, under the deed, surrender, will, or other assurance directing such accumulation, would for the time being[1], if of full age, be entitled to the rents, issues, and profits, or the dividends or annual produce so directed to be accumulated[2].

Comparison with perpetuity rule.

It will be noticed that each of the four periods above mentioned is less than the period allowed by the perpetuity rule itself. There is not very much difference in substantial effect between the second and third periods, and for most practical purposes it would seem that the framer of the Act might have contented himself with two alternative periods only, viz.: (1) The life of the grantor, etc., or (2) 21 years from his death.

Exceptions in the Act.

The Accumulations Act 1800, however, allows three exceptions in which an accumulation may still be lawfully directed for the full limits of the perpetuity rule. These are: (1) any provision for payment of debts; (2) any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise; (3) any direction touching the produce of timber or wood upon any lands or tenements[3].

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[1] This fourth head enables a testator to validly direct accumulation during the minority of a person not born until after testator's death (*Re Cattell* (1907), 1 Ch., 567; 76 L. J., Ch., 242; 96 L. T., 612).

[2] 39 & 40 Geo. III., c. 98, sec. 1.

[3] Ibid., sec. 2. See *Re Heathcote* (1904), 73 L. J., Ch., 543; *Re Stephens* (1904), 73 L. J., Ch., 3.

Accumulations Act 1892

The Accumulations Act 1892[1] further provides that no person shall thenceforth settle or dispose of any property in such manner that the income thereof shall be wholly or partially *accumulated for the purchase of land only* for a longer period than during the minority, or respective minorities, of any person or persons who, under the trusts of the instrument directing such accumulation, would for the time being, if of age, be entitled to receive the income so directed to be accumulated. Thus suppose a testator gives property absolutely to A, subject to a direction that the income is to be accumulated for 21 years from his (the testator's) death, and every year to be invested in the purchase of other land, and in no other way. Suppose A at the testator's death is 16 years of age, here the income would only be thus accumulated for five years.

Effect of an excessive accumulation.

We have seen that any direction which may by possibility exceed the perpetuity rule must be void[2]. But suppose that a direction to accumulate income merely exceeds the provisions of either the Acts of 1800 or 1892, what is then the position? The well-known case of *Griffiths* v. *Vere*[3] decides that the direction to accumulate is not wholly void, but is merely bad for the excess. If, however, the direction to accumulate not only exceeds the periods allowed by the Acts, but also exceeds the limits of the perpetuity rule, then the direction is void *in toto*. This always would have been the case, and the Acts in question are not enabling, but restraining Acts, *i.e.*, they merely invalidate something which before would have been valid, and do not render valid anything which before would have been invalid.

Griffiths v. *Vere*.

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[1] 55 & 56 Vict., c. 58.
[2] Ante, p. 105; *Frost* v. *Frost* (1890), 43 Ch. D., 246; 59 L. J., Ch., 118.
[3] (1803), Tudor's Conveyancing Cases, 618.

Errington v. *Errington.*

Whenever a direction to accumulate exceeds the provisions of the Accumulations Act 1800, it is necessary to consider for what period the direction is good, as there are four alternative periods given in the Act. It has been laid down that the period mentioned in the statute which actually fits the intention of the settlor or testator, as declared in the instrument containing the direction, must be the period chosen, and for anything beyond that the direction is void. The period for which the direction to accumulate is to be held good is not necessarily the longest possible period permitted by the Act[1].

Weatherall v. *Thornburgh.*

The only remaining question to be considered in connection with the Act is, to whom accumulations which are excessive and bad will go. The answer is that they will go to such person or persons as would have been entitled thereto if such accumulation had not been directed. Thus A devised his property to trustees in trust for his wife for life, or until second marriage, and in case of second marriage directed the income to be accumulated during the remainder of her life (a direction which clearly might exceed the periods allowed by the Accumulations Act 1800) ; and he then gave the property, with all accumulations, to X at the death of his wife. The widow married again, and lived more than 21 years from the testator's death, and it was held there was an intestacy as to the accumulations during the period between 21 years from the testator's death and the death of his widow, and that the heir of the testator took the income for the rest of the life of the testator's widow[2].

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[1] *Errington* v. *Errington* (1897), 76 L. T., 616.

[2] *Weatherall* v. *Thornburgh* (1878), L. R., 8 Ch. D., 261 ; 47 L. J., Ch., 658. See also *Re Parry, Powell* v. *Parry* (1889), 60 L. T., 489 ; *Re Travis, Frost* v. *Greatorex* (1900), 2 Ch., 541 ; 69 L. J., Ch., 663 ; 83 L. T., 241.

Re Pope.

If excessive accumulations fall into a settled fund, they form part of the capital of that fund and cannot be treated as income. Thus a testator gave realty to trustees in trust to apply the income at discretion for the benefit of Frances, a person of unsound mind, for life, and to accumulate the surplus, and after the death of Frances to hold the realty and accumulations for Florence, and the residue of testator's property was settled in trust for X for life with limitations over. Testator died in 1866, and Frances in 1900. And it was held that the surplus income from the end of 21 years after testator's death to 1900 fell into the settled residue, but was capital and did not go as income to X as tenant for life[1].

London and South Western Railway Company v. *Gomm.*

The force of the Accumulations Acts is only seen in the case of settlements and wills, but the application of the perpetuity rule is much wider. Under it no person can tie up or in any way control the devolution of property for more than a life or lives in being and 21 years afterwards. Thus, as regards an option to buy land, the option is bad unless it is limited to the period allowed by the perpetuity rule[2]; and this is the case even if the option is given to a lessee for more than 21 years by the lease to buy the freehold at any time during the lease[3]. However, a covenant made by a tenant in fee simple, imposing some restriction on the use of the land, *e.g.*, not to build thereon, is not affected by the perpetuity rule,

[1] *Re Pope*, *Sharp* v. *Marshall* (1901), 1 Ch., 64; 70 L. J., Ch., 26; 49 W. R., 122, following *Crawley* v. *Crawley*, 7 Sim., 427, and *O'Neill* v. *Lucas*, 2 Keen, 313, and dissenting from *Phillips* v. *Levy* (1880), 49 L. J., Ch., 198.

[2] *L. & S. W. Ry. Co.* v. *Gomm* (1882), 20 Ch. D., 562; 51 L. J., Ch., 530; 46 L. T., 449; 30 W. R., 620. As another instance, see *Thomas* v. *Thomas* (1903), 87 L. T., 58.

[3] *Woodall* v. *Clifton* (1905), 2 Ch., 257; 74 L. J., Ch., 555; 93 L. T., 257. Yet it was held that damages for breach of the contract created by the option are recoverable (*Worthing Corporation* v. *Heather* (1906), 2 Ch., 532; 75 L. J., Ch., 761; 95 L. T., 718), on the ground that contracts are not affected by the perpetuity rule except as far as they create interests in property.

nor is a covenant for the future renewal of a lease[1]. Further, a covenant to do any act in the future, as to pay money, is not avoided by reason that the time for performance may not arise within the period allowed by the perpetuity rule[2]. And the rule of perpetuities does not prevent the creation of a perpetual trust for charitable purposes; nor (as already stated) does it apply to any limitations after an estate tail; nor to covenants by a fee simple owner restricting the user of his land which are regarded as conferring an immediate interest in equity in the nature of an easement[3]; nor to a properly expressed covenant for perpetual renewal of a lease[4].

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[1] *L. & S. W. Ry. Co.* v. *Gomm*, ante, p. 110.
[2] *Walsh* v. *Secretary of State for India* (1863), 10 H. L., 367.
[3] See *Ex parte Ralph* (1845), De G. at 225; *Formby* v. *Barker* (1903), 2 Ch., at 551-553.
[4] Ante, p. 82.

CHAPTER V.

INCORPOREAL INTERESTS IN PROPERTY.

Corporeal and incorporeal property generally.

PROPERTY is often spoken of as being either corporeal or incorporeal, a distinction which owes its origin to some extent to common sense. The distinction, no doubt, first came about in connection with land, and we have the corporeal and the incorporeal hereditament, the former being an interest in land which confers the possession or seisin, and the latter not entitling its owner to possession of the land. But as time has progressed we find the expression used with regard also to personalty, and we have also the corporeal and the incorporeal chattel. Land itself in possession of a legal owner is, of course, most corporeal, and so equally is a chattel in possession. The reversionary, or future interest, in either kind of property is in a sense incorporeal, and so are various interests and rights in connection thereto. The equitable owner of either real or personal property may be said to have an incorporeal right, and so may a person who has a right of common, or an easement in respect of land, or who is entitled to a patent-right, copyright, or a trade mark.

Definition and divisions.

Incorporeal property may, in the widest sense, be defined as an estate, right or interest connected with corporeal property, and may be divided generally into two kinds: (1) Incorporeal hereditaments; (2) Incorporeal chattel interests. The following are examples of the first class: reversions, remainders, and executory interests in freehold or copyhold land, advowsons, rights of common, and easements. The

following are examples of the second class: reversionary or future interests in personal property, patents, copyrights, trade marks, and perhaps choses in action. Equitable interests, rents, and annuities may sometimes fall under one class and sometimes the other.

We have already sufficiently dealt with future estates and interests, viz., reversions, remainders, and executory interests, and all kinds of reversionary interests in personal property[1]. We have also considered the difference between the legal and the equitable estate, or interest, in property[2]. The only sense in which an equitable, as opposed to a legal, estate or interest can be styled "incorporeal" is that the person having the equitable or beneficial interest has not necessarily got the present tangible possession. It is not proposed to here deal with either patents, copyright, trade marks, or choses in action, as the necessary knowledge with regard to them can best be acquired from other works, and it cannot be said that there is much in connection with them that properly appertains to the subject of Conveyancing[3]. This leaves us with five incorporeal interests for our consideration here, which we will take in the following order: I. Rents; II. Annuities; III. Advowsons; IV. Rights of Common; V. Easements, but the last two demand the most attention.

Five incorporeal properties for consideration here.

A rent signifies a compensation, or return, of a certain amount yielded periodically out of the profits of any corporeal property by the tenant thereof[4], I. Rents.

[1] Ante, Chap. IV.
[2] Ante, Chap. III.
[3] As to Patents, see Indermaur's Common Law, 214; as to Copyright, Ibid., 217; as to Trade Marks, Ibid., 222; as to Choses in action, Ibid., 165. As to all these subjects, see further Williams' Personal Property, or Goodeve's Personal Property.
[4] 1 Stephen's Commentaries, 412.

and it may be in respect of real property, or personal property, and that is why it has been stated that it may sometimes fall under the one of our classifications, and sometimes under the other. A rent may be either: (1) rent-service, a rent payable in respect of tenure, or (2) rent-charge, a rent payable irrespective of tenure. As to a rent-service, it is evident that before the Statute of *Quia Emptores*[1] it could be reserved in respect of any estate in land, but it cannot, since that statute, be reserved in respect of a fee simple holding. The tenant holds of the landlord, paying so much per annum in respect of his tenancy. The landlord has a right of distress for his rent[2], and other rights (*e.g.*, a right of re-entry) according to the terms of the instrument creating the holding. This is a matter we shall hereafter have occasion to consider in dealing with the subject of leases[3]. In every case where there was rent-service, it was essential that there should be a seignory or a reversion in the lord, and the existence of this was the foundation of the right to distrain. If a person entitled to a rent aliened his reversion, then, though no mention was made of the rent, yet that passed as an accessory of the principal thing, the reversion; but if he aliened his rent without mention of the reversion, then the reversion would not pass to the alienee. This is still technically the rule, and is expressed by the maxim *Accessorium non ducit sed sequitur suum principale*, but the point is not now of the practical importance that it once was. Formerly the person who had the right to the rent, without having the reversion, had what was styled a rent-seck, because he had no power of distress, but this has been altered by statute, and a power of distress is now made incident to all rents[4].

Rent-service.

Indermaur's Common Law, 75.

Rent-seck.

[1] Ante, p. 78.
[2] As to Distress, see Indermaur's Common Law, 75.
[3] Post, Chap. XIII.
[4] 4 Geo. II., c. 28; 44 & 45 Vict., c. 41, sec. 44.

Rack-rent.

The most important and usual rent-service that is met with is the rack-rent, which means a full rent; and this is the ordinary rent reserved on the granting of an occupation lease, *e.g.*, a yearly tenancy, or the common lease for 7, 14, or 21 years. Then there is the ground rent, which signifies a rent reserved on the granting of a lease of land for building purposes. Thus if A, being a fee simple owner, grants his land to B for 99 years at a rent of £10 a year, B covenanting to build a house thereon, A remains the fee simple owner, and at the end of the 99 years the land with the house upon it will revert to him, or rather to his representatives. During the term, however, A simply takes the rent, and this is what is meant when it is stated that a person is entitled to a freehold ground rent. Suppose, however, in the foregoing example B sub-leases the land to C for the whole term, except the last few days, at a rental of £15 per annum. B receives during the term £15 a year from C, and pays A £10 a year, making thus a profit of £5 a year. B is said here to have a leasehold ground rent, or an improved leasehold ground rent; at the end of the term, of course B's leasehold interest comes to an end, whilst in the case of A his interest does not end, but probably becomes increased, for he gets the land with the house upon it, and has a right from that time to any rack-rent he can obtain in respect of the house. As a contrast to these ordinary rents may be noticed the peppercorn rent, which occurs where on the creation of a tenancy a merely nominal rent is reserved, usually for the purpose of obtaining an acknowledgment that the relationship of landlord and tenant exists.

Freehold ground rent.

Leasehold ground rent.

Peppercorn rent.

The following are rent-services not often met with now:—

Rent of assize.

A Rent of Assize, which is an ancient rent some-

times paid by a freeholder, or copyholder, of a manor from time immemorial to the lord.

Quit rent.

A Quit Rent, which is a term used to signify either of the foregoing rents of assize.

Fee farm rent.

A Fee Farm Rent, which was a rent sometimes formerly reserved on the grant of a fee simple estate, consisting of at least one-fourth of the value of the land at the time of reservation.

Rent-charge.

A rent-charge is an annual sum charged upon land, by some deed or will, and payable by the land-owner quite irrespective of tenure. Thus if B pays A £1000, and A in consideration thereof covenants to pay B £100 a year during his (B's) life, and charges his land with the payment of such annual sum, here B has a rent-charge of £100 a year. Or, to take another example, suppose A devises Whiteacre to B in fee simple, charged with payment thereout of £100 a year to C during his life, here C has a rent-charge. There being no tenure in connection with any rent-charge, there was at Common Law no power of distress to enforce payment of it; and, unless such a power was expressly conferred by the instrument creating the rent-charge, the owner in fact had a *rent-seck*.

Enforcing payment of rent-charge.

But now, where a person is entitled to receive any annual sum charged on land or its income, under any instrument coming into operation since 1881 (which does not provide the contrary), the Conveyancing Act 1881 confers the following powers upon the owner of the rent-charge: (1) If the rent-charge is in arrear for 21 days, a power of distress; (2) if it is in arrear for 40 days, power to enter into possession and take the income until the arrears are satisfied, or instead, or in addition, to demise the land to a trustee for a term of years upon trust, by way of mortgage, or sale, or demise of the whole or any

part of the term, to raise the money to satisfy the arrears[1].

Action of debt for rent charge.

The owner of a freehold rent-charge can still bring an action for debt against the freehold owner in possession of the land charged[2], even if he is in possession of part only of the land[3], and this whether he has received any profits from the land or not[4], though he may not sue a tenant for years in possession of the land[5]. This right has nothing to do with any question of covenants running with land, but is simply a question of the remedy since 3 & 4 Wm. IV., c. 27, abolished real actions.

Registration

A rent-charge most usually comes into existence under the provisions of a marriage settlement or a will; and when this is not the case, the deed creating the rent-charge must be registered in the Land Registry[6] so as to afford protection to purchasers and mortgagees of the land without notice.

Tithe rent-charge

Tithes.

One particular kind of rent-charge must be here specially noticed, and that is tithe rent-charge, which has in modern times taken the place of the former right to tithes. A tithe rent-charge is an annual sum arising out of land, in place of the ancient tithes which formerly existed, but do not exist now. Tithe was a tenth part of the increase yearly arising from the profits of land and stock, or raised by the

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[1] 44 & 45 Vict., c. 41, sec. 44.

[2] *Thomas* v. *Sylvester* (1873), L. R., 8 Q. B., 368; 42 L. J., Q. B., 239; *Booth* v. *Smith* (1885), 14 Q. B. D., 318: 54 L. J., Q. B., 119; *Re Blackburn Building Society* (1890), 42 Ch. D., 343; 59 L. J., Ch., 183; *Searle* v. *Cook* (1890), 43 Ch. D., 519; 59 L. J., Ch., 259.

[3] *Christie* v. *Barber* (1884), 53 L. J., Q. B., 537.

[4] *Pertwee* v. *Townsend* (1896), 2 Q. B., 129; 65 L. J., Q. B., 659; 75 L. T., 104.

[5] *Re Herbage Rents* (1896), 2 Ch., 811; 65 L. J., Ch., 871; 75 L. T., 148.

[6] 18 & 19 Vict., c. 15, sec. 12; 63 & 64 Vict., c. 26.

industry of the parishioner, and was properly due to the clergy that had the cure of souls in the parish where it arose. Tithes were either prædial, arising immediately from the land; mixed, arising from animals and animal products; or personal, arising from a man's work; and they were also divided into great or rectorial tithes, and small or vicarial tithes. The inconveniences of taking tithes in kind led to a *modus* existing in some cases, a *modus* being a contract between parties before the time of legal memory, by which the tithe owner had the right to a fixed sum, or certain fixed produce, in place of the ordinary tithe. But the common law tithe and the *modus* have now been converted, under the numerous Tithe Acts[1], either by agreement or compulsorily, into an annual rent-charge which varies every year according to the average price of British corn (*i.e.*, wheat, barley, and oats) for the past seven years as ascertained under the Corn Returns Act 1882[2]. This is the modern tithe rent-charge, which when once ascertained for each parish was apportioned among the various parcels of land therein, and made payable on each first of January and July.

Modus

ithe Acts.

The tithe rent-charge is a separate incorporeal hereditament, and provision is made under which, where the owner of the tithe rent-charge is also owner of the land out of which it issues, he may extinguish or merge the tithe rent-charge by executing

esser of tithe ent-charge,

) by merger

[1] The first Act was passed in 1836 (6 & 7 Wm. IV., c. 71).

[2] The process was to ascertain the net yearly average cash value of the tithes in each parish for the seven years up to Christmas, 1835, and then to divide that sum into three equal parts and ascertain how many imperial bushels of British wheat, barley, and oats respectively could have been bought by each third according to a scale of prices published in January, 1837; and the tithe rent-charge varies in each year according to the average purchase price of that number of bushels respectively for the previous seven years up to the Thursday before each Christmas Day as advertised by the Board of Trade in the *London Gazette* each January.

a deed approved by the Board of Agriculture. The ancient tithe did not merge by the acquirement of the land out of which it issued. When a merger or extinction of tithe rent-charge takes place, then the land becomes subject to any incumbrance existing on the rent-charge. Tithe rent-charge may also be redeemed by payment of (as a general rule) 25 times the amount of the rent-charge[1], and this is a course that is generally found advisable to be taken on the sale of land in building plots, where there has not been an apportionment of the tithe rent-charge.

(*b*) by redemption.

At Common Law the recovery of tithes was enforced by proceedings against the actual occupier, but when the tithe rent-charge was substituted, it was provided that it should be enforced by distress[2]. A great change in the law was however effected by the Tithe Act 1891[3], which was passed with the object of making the landowner, as distinguished from the occupier, the person liable. It provides that the tithe rent-charge shall be payable by the owner notwithstanding any contract between him and the occupier, and that any contract between the occupier and the owner, made after 26th March, 1891, for the purpose of throwing the obligation on the occupier shall be void[4]. As regards any contract to that effect in existence before 26th March, 1891, it provides that so long as such contract continues, there shall be no direct obligation on the occupier to pay the tithe rent-charge, but that the owner must pay it, and may then obtain recoupment from the occupier by distress[4]. The provision of the Conveyancing Act 1881, to which we have referred with regard to the enforcement of rent-charges generally,

Enforcement of tithe rent-charge.

Tithe Act 1891.

[1] 41 & 42 Vict., c. 42, sec. 3.
[2] 6 & 7 Wm. IV., c. 71, sec. 81.
[3] 54 Vict., c. 8.
[4] Ibid., sec. 1; *Ludlow* v. *Pike* (1904), 1 K. B., 531; 73 L. J., K. B., 274; 90 L. T., 458.

has no application to tithe rent-charge. Payment of the latter is enforced by an order to pay, which the tithe owner can obtain, after the tithe is three months in arrear, on application to the local county court. The order is enforced: (1) if the land is let, by the county court judge appointing a receiver of the rent; and (2) if the land is in hand, by the county court bailiff distraining[1]. Not more than two years' arrears can be recovered[2].

I. Annuities.

An annuity (or a personal annuity as it is sometimes styled to distinguish it from a rent-charge) is an annual payment not charged on land, but resting merely on personal obligation, and it is here we see the distinction between it and a rent-charge. Thus, to revert to our examples of a rent-charge[3], suppose A in consideration of the payment of £1000 simply covenants to pay B £100 a year, or that a testator simply directs £100 a year to be paid from his estate to C during his life. Here, in each case, we have an annuity as distinguished from a rent-charge. An annuity is strictly personal property, but yet it *may* descend to the heir. An annuity may be given to a person merely for his life, and this is the usual kind of annuity; but it may be in its nature perpetual, and may be limited to the annuitant, his executors, administrators, and assigns, or to the annuitant and his heirs, or even to the annuitant and the heirs of his body. If the annuity is given merely to a person for his life, it naturally ends with that person's death; but if the annuity is perpetual, it may be disposed of by will, and in such cases it will pass under a general bequest of all the testator's personalty. If, however, the owner of a perpetual annuity dies intestate, though, if it is limited to the annuitant, his executors,

Devolution of an annuity.

[1] 54 Vict., c. 8, sec. 2.
[2] 6 & 7 Wm. IV., c. 71, sec. 81; 54 Vict., c. 8, sec. 2.
[3] Ante, p. 116.

administrators, and assigns, it passes as personalty to the next-of-kin, yet if it is limited to the annuitant and his heirs, it passes to his heir. If an annuity is granted to the annuitant and the heirs of his body, the position is peculiar. The annuitant cannot have an estate tail in the annuity, because it is not a tenement within the meaning of the Statute *De Donis*, and it is therefore held that he has an interest equivalent to the estate that existed in land before the Statute *De Donis*, when it was granted to the tenant and the heirs of his body[1]. In other words, the annuitant has a perpetual annuity to him and his heirs, as soon as he has issue born, and can alienate it in perpetuity by simple assignment in the life of the issue[2].

Rights of annuitant.

But although a gift may take the form of an annuity, it does not follow that the annuitant must rest content with receiving the annual payment. For whenever a testator gives money to buy an annuity, or directs a government annuity of a fixed amount to be bought, the annuitant is entitled to claim to have paid to him the sum so bequeathed for the purchase, or a sum of money equivalent to the value of the annuity; and if the annuitant dies without having expressed his wishes and before the annuity is bought, his legal personal representative can demand the sum bequeathed or the purchase price[3]. And a direction in the will that the annuitant is not to have the value of the annuity is void[4], unless there is a gift over[5] or proviso for cessor[6] on alienation, and

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[1] Ante, p. 22.
[2] Williams' Personal Property, 285, 286; 1 Wh. & Tu., 799.
[3] *Re Robbins* (1907), 2 Ch., 8; 76 L. J., Ch., 531; 96 L. T., 755; *Re Brunning* (1909), 1 Ch., 276; 78 L. J., Ch., 75; 99 L. T., 918.
[4] *Stokes* v. *Cheek* (1860), 28 Beav., 620.
[5] *Power* v. *Hayne* (1869), L. R., 8 Eq., 262.
[6] *Hatton* v. *May* (1876), 3 Ch. D., 148; *Re Mabbett* (1891), 1 Ch., 714; 60 L. J., Ch., 278.

even such a proviso is void if the annuity is to be bought in the name of the annuitant[1]. This, however, has no application to a mere covenant to pay an annuity[2].

I. Advowsons.

An advowson is the perpetual right of presentation to an ecclesiastical benefice, and it is an incorporeal hereditament, and real property. If, however, a person has not the entire advowson, but only the right of next presentation, this is personal property.

enefices Act 98.

A next presentation cannot, since 1st January, 1899, be created apart from the entire advowson[3], but it is nevertheless still possible to find a right of next presentation existing by itself in a person, by reason of acquirement before 1899. Advowsons may be either (1) Presentative, when the right is to present a clergyman to the bishop, who (after due inquiry) institutes him, and causes him to be inducted into his office; or (2) Collative, where the owner of the advowson is the bishop himself, and therefore there are not separate acts of presentation and institution. An advowson might also formerly have been donative, *i.e.*, where the incumbent was appointed simply by the patron's deed of gift, but every donative advowson was changed into a presentative one by the Benefices Act 1898[4]. An advowson may be appendant to some manor, or in gross, *i.e.*, subsisting irrespective of the ownership of any manor; it may be held in estates like freehold land, and dower may be claimed out of it, which right takes the form of the widow having the right to the third presentation. Where an advowson is held in joint tenancy or tenancy in common, all the tenants must concur in making a

Estates in advowsons.

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[1] *Hunt-Foulston* v. *Furber* (1876), 3 Ch. D., 285.
[2] 1 Wh. & Tu., 807.
[3] 61 & 62 Vict., c. 48, sec. 1.
[4] Ibid., sec. 12.

presentation; and if they cannot agree, but each presents, the bishop may refuse to accept all the nominees, or may accept which he pleases. When an advowson is held in co-parcenary, all the co-parceners should together make a presentation, but if they cannot agree the eldest co-parcener may present. If, on a vacancy occurring, no presentation is made within six months, the right of presentation lapses to the bishop. Lapse.

An advowson may be sold or mortgaged; but when mortgaged, if a vacancy occurs, though the mortgagee presents, yet he must present the nominee of the mortgagor, for the reason that in such case the next presentation is an unsaleable property. If a person has a next presentation alone (which can only be the case if he acquired it before 1899), it may be sold if the living is full, but not if it is vacant, for to sell under such circumstances is illegal, and constitutes the offence of simony[1]. Even if the living is full, the next presentation could not be purchased by a clergyman for his own preferment, though he may purchase the entire advowson, and then present to himself on a vacancy occurring. No right of patronage can now be sold by auction, except along with a manor or with a hundred acres of land belonging to the same owner; and no transfer of a right of patronage is now valid unless it is registered in the diocesan registry within one month, and it transfers the whole interest of the transferor (except the reservation of a life interest to the settlor in a family settlement or of the equity of redemption to a mortgagor) and more than 12 months have elapsed since the last institution of admission to the benefice[2]. Sale or mortgage o advowson. Simony.

[1] *Fox* v. *Bishop of Chester* (1829), Tudor's Conveyancing Cases, 810.
[2] 61 & 62 Vict., c. 48, sec. 1.

Resignation bonds.

In connection with advowsons it may be well also to notice the subject of a resignation bond, which is a bond executed by a minister who is appointed to a living, whereby he agrees to resign it in a certain person's favour. A general resignation bond is bad, but such a bond is good if in favour of any one person named, or if in favour of one of two named persons, each of whom is by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew, of the patron, or one of the patrons. The bond must be in duplicate, and one part must be deposited within two calendar months in the office of the registrar of the diocese, and the resignation, when made, must refer to the bond, and state for whose benefit it is made[1]. The validity of this bond is specially preserved by the Benefices Act 1898[2].

IV. Rights of common.

A right of common may be defined as a right which one person has of taking some part of the produce of land, while the whole property in the land is vested in another[3]. Five kinds of rights of common will here be mentioned :—

1. Pasture.

1. *Common of Pasture.*—This is a right to depasture beasts on the waste lands of a manor, or on another man's lands, and it may be of four different kinds, viz., appendant, appurtenant, in gross, or *pur cause de vicinage*[4]. Common of pasture appendant exists by the Common Law[5], forming a necessary incident of a manor, and being, therefore, by reason of the Statute of *Quia Emptores*, incapable of creation at the present day. It consists in the right of a tenant of arable lands in a manor, or lands that were originally arable lands, to depasture his horses, cattle,

Appendant.

[1] 9 Geo. IV., c. 94.
[2] 61 & 62 Vict., c. 48.
[3] Tudor's Conveyancing Cases, 700.
[4] Ibid., 707.
[5] *Tyrringham's Case* (1584), Tudor's Conveyancing Cases, 700.

and sheep on the waste lands of the manor, but it does not extend to any other animals. It ordinarily exists for so many animals as the tenant has occasion for, to plough and manure his land, but it may by usage be limited to a certain number of animals. Common of pasture appurtenant, though equally like common of pasture appendant annexed to the ownership of land, does not exist by the Common Law, but arises by grant or prescription, and it may be claimed in respect of any animals, or even birds, *e.g.*, geese. Common of pasture in gross is a right similar to common of pasture appurtenant, but it is not annexed to the ownership of land. Common of pasture *pur cause de vicinage* is a right where two commons adjoin each other, and the persons having strictly a right of pasturage only over one of the commons allow their cattle indiscriminately to range over both, and as it is only an excuse for trespass it may be stopped by the owners of either common fencing out the others, no matter how long it has existed[1]. In close connection with this may be noticed common of shack, or the right of persons owning different strips of land in one common field to turn out their cattle after harvest to feed promiscuously in that field[2]; this was in its origin common of vicinage, but is now classed as common appurtenant.

Appurtenan

In gross.

Vicinage.

Shack.

2. *Common of Piscary.*—This is the right of fishing in waters on the soil of another person. It may be either appurtenant, or in gross.

2. Piscary.

3. *Common of Turbary.*—This consists in the right of digging turf for the purpose of fuel, either from a common, or from the lands of another person. It cannot be claimed as a mere general right, but where

3. Turbary.

[1] Tudor's Conveyancing Cases, 708-712.
[2] 1 Stephen's Commentaries, 440.

it exists it must be subject to some limitation or restriction[1]. It may be appendant or appurtenant to a house, but very naturally cannot be appendant to land without a house on it.

4. Estovers.

4. *Common of Estovers.*—This is the right which a person may have of cutting wood from a common, or from the lands of another person. Under it are included housebote, or wood for repairs of a house and for fuel; ploughbote, or wood for the repair of agricultural implements; and hedgebote, or wood for repairing fences. The claim must be a reasonable one[2]. It may be appendant, appurtenant, or in gross.

5. Soil.

5. *Common in the Soil.*—This is a right resembling common of turbary, consisting of a right to get sand, gravel, clay, stone, coal, and other minerals from a common, or from the lands of another[3]. It may be appendant, appurtenant, or in gross.

How rights of common acquired.

All rights of common are distinct rights of profit *in alieno solo*, and are styled generally *profits à prendre*. No such right can be claimed by custom, because a custom to take part of another man's land must have been a bad custom to start with, but there is an exception to this rule in the case of copyholds. All sorts of rights *in alieno solo* may be claimed by copyholders by force of custom, provided they are not utterly unreasonable, *e.g.*, to dig up the lord's soil for turf, sand, gravel and clay, and even to carry away and sell the same[4]. Except, therefore, that in the case of copyholders we must add "custom," we may say that rights of common can

[1] Tudor's Conveyancing Cases, 716.
[2] Ibid., 714, 715.
[3] See *Heath* v. *Deane* (1905), 2 Ch., 86; 74 L. J., Ch., 466; 92 L. T., 643.
[4] Tudor's Conveyancing Cases, 717, 718.

only be acquired by grant, prescription, or Act of Parliament. Naturally, any owner of land may grant to another any interest in his lands, and practically anything may be done by the provisions of an Act of Parliament. The subject of prescription is important, and is specially dealt with later on in this chapter[1].

Of all the kinds of *profits à prendre*, common of pasture is naturally the most general and important. We can well understand how essential it was, in the creation of a manor, that there should be waste lands on which the tenants of arable land could depasture their beasts. As was laid down in *Tyrringham's Case*[2], it is a right existing by the Common Law; but as the reason of its existence was the necessity of the tenant, it followed that if such necessity ceased the right also would end, and, therefore, the lord could always approve or enclose waste lands not required. This common law right was confirmed by the Statute of Merton[3], but at the present day it is limited in this way, viz., that the lord cannot approve or enclose without the consent of the Board of Agriculture[4].

Tyrringham Case.

Statute of Merton.

Commons Amendment Act 1893.

Where a person entitled to any right of common is unlawfully interfered with in the exercise of his right, he may bring an action for damages in respect of the disturbance, or for an injunction. If he is altogether prevented from exercising his right, he may also abate that which prevents his enjoyment of such right, provided he can do so peaceably, and if he finds cattle of a stranger on the common, he can distrain upon them *damage feasant*[5].

Disturbance of common.

[1] Post, pp. 138-149.
[2] Tudor's Conveyancing Cases, 700.
[3] 20 Hy. III., c. 4.
[4] 56 & 57 Vict., c. 57.
[5] Tudor's Conveyancing Cases, 725.

Alienation.

Where a right of common is either appendant or appurtenant to land, it will pass together with the land on its alienation, without any particular or even general words[1]. But such rights cannot be alienated apart from the land[2].

Extinguishment.

Rights of common are liable to be extinguished in a variety of ways, of which the following are the chief:—

1. By unity of seisin or ownership. In the case of a common appendant or appurtenant, the right of common, and the land over which the right is claimed, may become vested in one and the same person, in which case there is an end of the right. This, however, appears not to be the case with regard to common *pur cause de vicinage*, so that on the lands being again held in separate ownerships the right will still be existing.

2. By the person entitled to the right of common executing a deed releasing the land over which he has the right, or any part of it, from any further claim.

3. By a common law enfranchisement, though not by an enfranchisement under the Copyhold Act 1894[3].

4. By approvement or enclosure of waste lands, as before mentioned[4].

5. By a permanent disuse or abandonment of the right[5].

V. Easements.

An easement may be defined as a privilege without profit, which the owner of one tenement, which is called the dominant, has over another, which is called the servient, to compel the owner of the latter

[1] 44 & 45 Vict., c. 41, sec. 6.
[2] Tudor's Conveyancing Cases, 726.
[3] Ante, p. 26.
[4] Ante, p. 127.
[5] Tudor's Conveyancing Cases, 726-731.

to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former[1]. The distinguishing feature between a right of common and an easement is, that the former is a right of profit in another's land, or *profit à prendre*, whilst the latter is unconnected with profit, and is in fact a right which tends rather to the convenience than to the profit of the claimant. As examples of easements may be mentioned, a right of way across another's land, the right to the flow of a stream, a right to discharge water on to another's land, a right to the support of buildings, a right to prevent the obstruction of light. In none of these examples do we see any taking away of a profit out of another's land, although, of course, the convenience may incidentally be the occasion of profit to the person having the easement. The only true resemblances between easements and rights of common are, that they are both incorporeal in their nature, and both form branches of the law of servitudes, or rights *in alieno solo*.

Instances.

The expressions "dominant" and "servient" in the definition given above must be thoroughly understood. One person has a right over another's land, and is the dominant person, whilst the other who has to submit to the exercise of that right is the servient individual; the land in respect of which the right is claimed is naturally styled the dominant tenement, and the property over which the right exists is naturally styled the servient tenement. Thus A, as the owner of Whiteacre, has a right of way over Blackacre, which belongs to B. A is the dominant owner, and Whiteacre the dominant tenement; B is the servient owner, and Blackacre the servient tenement.

"Dominant and "servient."

[1] Tudor's Conveyancing Cases, 744; Goddard, 2; Gale, 8.

Rights *ex jure naturæ*.

Some rights in the nature of easements arise *ex jure naturæ*, and these are something more than ordinary easements, for they are natural rights of ownership.

Sury v. *Pigot*.

This is recognized in the well-known case of *Sury* v. *Pigot*[1], where it was admitted that a watercourse—that is the right of a riparian owner to the benefit of the ordinary flow of a river—has its origin *ex jure naturæ*, and that no grant or title by prescription need be shewn.

Riparian proprietors.

There is no property in a natural river, but all owners of land through which it passes (riparian proprietors) have rights in it; they may each use it, and none must dam it up, divert it, foul it, or diminish it beyond an extent consistent with a reasonable use[2]. It is a higher right than is an ordinary easement, but yet it is in substance an easement. If a river runs through A's land, and from that through B's land, B has a right to the uninterrupted flow of the water through A's land, and, therefore, B has substantially an easement to the flow of the water; his is practically the dominant tenement, and A's the servient tenement. This right to the uninterrupted flow of water exists, however, only in respect of water flowing in a defined channel, and has no application to water that is merely percolating through the soil[3]. Another instance of a

Support of land.

natural easement is found in the right that every man having land adjoining or over that of another, has to require the other to continue the support afforded by his adjacent or subjacent soil, so as to maintain his land in its natural state unweighted by buildings[4].

Right to air.

A further instance of a right *ex jure naturæ* is found in the right of the owner of every tenement to receive

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[1] (1626) Tudor's Conveyancing Cases, 732.

[2] *White* v. *White* (1906), A. C., 72; 75 L. J., P. C., 14; 94 L. T., 65.

[3] *Chasemore* v. *Richards* (1859), 7 H.L., 349; *Bradford Corporation* v. *Pickles* (1895), A. C., 587; 64 L. J., Ch., 759; 73 L. T., 353.

[4] *Dalton* v. *Angus* (1881), 6 A. C., 740; 50 L. J., Q. B., 689; 44 L. T., 844.

vertically the air and light appertaining to the situation of the property, though there is no natural right to the uninterrupted flow of air or light to a tenement from an adjoining tenement[1]. The foregoing are all natural rights, and not proper easements as the word is commonly understood, though each is in the nature of, and is substantially, an easement.

Affirmative and negative easements.

Easements are said to be either (1) Affirmative or positive, or (2) Negative, the former consisting in the right of doing some act, and the latter in the right of preventing something being done. Thus a right of way is an affirmative or positive easement, while a right of light is a negative easement. Again

Continuous and discontinuous easements.

they are said to be (1) Continuous, and (2) Discontinuous, the former signifying an easement that goes on existing independently of any act constituting an assertion of the right, whilst the latter signifies one which depends on the doing of some act—thus a right of light is continuous, a right of way discontinuous. Finally, an easement is sometimes said to

Apparent and non-apparent easements.

be (1) Apparent, *e.g.*, a right of light, and (2) Non-apparent, *e.g.*, a right to discharge a stream of water along a certain channel.

Easements in gross.

It will have been gathered from our definition of an easement, that it must be a right accessory to the ownership of land; it is intended for the beneficial enjoyment of the dominant tenement, and cannot be severed from it, and passes to a purchaser or devisee of such tenement[2]. There cannot strictly be an easement in gross, though the expression is often used. Any man can, it is true, grant to another any kind of right over his (the grantor's) land, but this is a matter in the nature of a contractual right between the two parties, and cannot give the

[1] Innes on Easements, 48.
[2] *Simpson* v. *Godmanchester* (1897), A. C., 696; 66 L. J., Ch., 770.

grantee the rights against third persons that he would have in the case of a strict easement. Thus in one case it was held that the grantee from a canal company, of the sole and exclusive privilege of having pleasure boats for hire on the canal, could not sue a stranger for the infringement of his right, for though a grantor may bind himself by covenant to allow any right he pleases over his property, he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right[1]. An easement in gross is in fact simply a licence to do that which would otherwise be illegal; and if by parol is usually revocable, even if given for value and executed[2].

Hill v. *Tupper*.

Easements pass with the land.

Whenever an owner of land has, as such owner, an easement, and he conveys his land away, the easement also passes to the alienee; and the Conveyancing Act 1881[3] expressly provides that a conveyance of land, in the absence of contrary intention, includes easements appertaining or reputed to appertain to, or at the time of the conveyance enjoyed with, or reputed as parcel of, or appurtenant to, the land or any part thereof.

Modes of acquiring easements.

Easements may be acquired by express grant, implied grant, prescription, or Act of Parliament. The last-mentioned mode of acquiring an easement does not require any special attention. An express grant must be by deed; and by the Conveyancing Act 1881[4] it is provided that where freeholds are conveyed to the use that any person shall have an easement thereout, such grant of the use shall operate

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[1] *Hill* v. *Tupper* (1863), 2 H. & C., 121.

[2] *Wood* v. *Leadbitter* (1845), 14 L. J., Ex., 161. For exceptions see *Winter* v. *Brockwell* (1807), 8 East., 309, and *Wood* v. *Manley* (1839), 11 A. & E., 30.

[3] 44 & 45 Vict., c. 41, sec. 6.

[4] Ibid., sec. 62.

to vest the easement in such person—which obviates the former necessity for the grantee to execute the deed. The subject of prescription is dealt with later on in this chapter[1]. This leaves us now with the creation of an easement by reason of implied grant.

Implied gra of two kind

Easements by implied grant arise on the severance of a tenement into two or more parts, and consist of: (1) those easements of a continuous and apparent character which were actually used by the owner during the unity of possession, although they had not during that period in strict law the character of easements; (2) those easements which are necessary for the use of the severed part of the tenement, and these are styled easements of necessity[2].

Instances o first kind.

As an example of the first of the above kinds of easements arising by implied grant, suppose A conveys his house to B, keeping certain adjoining land which also belongs to him, here B has impliedly the right of support from A's adjoining land, even though the house has only just been built. Or suppose A builds a house on part of his land, which derives light to its windows from adjoining land of A, and he then sells the house to B, neither A, nor anyone claiming under him, may build upon the adjoining land so as to obstruct the enjoyment of these lights[3]. In both these examples the reason is to be found in the rule that a man cannot derogate from his own grant. If, however, in the last example A conveys away the adjoining land but retains the house, there will be no implied grant by the purchaser of the easement of light necessary for the enjoyment of the house, and he may build on the

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[1] Post, pp. 138-149.
[2] Tudor's Conveyancing Cases, 750.
[3] *Palmer* v. *Fletcher* (1675), 1 Lev., 122.

Rigby v. *Bennett.*

land as he pleases[1]. But if A sells[2], or devises[3], both the house and the adjoining land, at the same time, to different persons, it has been held that the purchaser, or devisee, of the land may not build so as to obstruct the light of the house[4]. This kind of implied grant only exists, ordinarily, where the easement is continuous and apparent, and therefore, in the case of a right of way, a grant of it will not be implied, unless indeed it is practically a way of necessity. An easement will, however, be considered apparent, though it may not necessarily be seen, if it be such that it might be seen, or known, on a careful inspection; so that when the owner of two adjoining houses sells and conveys one of them to a purchaser such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express grant or reservation for that purpose[5].

Easements of necessity.

Easements of necessity are such as the law presumes from the nature of the case, inasmuch as without them the intention of the parties to the severance of the tenement could not be carried into effect, *e.g.*, if A having a field, surrounded by other land belonging to him, sells and conveys that field to B, B has, as incident to the grant, a right of way to the field over A's land, because without it he cannot derive any benefit from the grant[6]. Such right of way, however, will only exist for the user of the field as it was at the time of the grant, and if, therefore,

Corporation of London v. *Rigg.*

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[1] *White* v. *Bess* (1862), 7 H. & N., 722; *Wheeldon* v. *Burrows* (1879), 12 Ch. D., 31; 48 L. J., Ch., 853.

[2] *Rigby* v. *Bennett* (1882), 21 Ch. D., 567; 48 L. T., 477; 31 W. R., 222.

[3] *Phillips* v. *Low* (1892), 1 Ch., 47; 61 L. J., Ch., 44; 65 L. T., 552.

[4] And this is so, even if A is a mortgagee selling under his statutory power of sale (*Born* v. *Turner* (1900), 2 Ch., 211; 69 L. J., Ch., 593; 83 L. T., 148).

[5] Tudor's Conveyancing Cases, 750-753.

[6] Ibid., 754.

B determined to build on the field, he would have no right of way for workmen to build thereon, or for the tenants of the houses that might be erected[1]. In such a case as is given in the above example, it does not follow that B has just such right of way over A's land as he may choose; he is no doubt entitled to a convenient right of way, but, subject to this, A is entitled to select, and give B, such a course as he pleases[2].

Railway company.

It has been pointed out that, ordinarily, under a grant of lands to a railway company, the minerals do not pass, but remain in the grantor[3]. The grantor has, therefore, the right to take the minerals, but—unless sections 77 to 85 of the Railways Clauses Act 1845[4] are incorporated in the Act under which the railway company has acquired the land[5]—then as an implied grant of necessity, the railway company has a right to all necessary lateral or subjacent support essential for the safety of the railway[6].

Extinguishment of easements.

Easements are liable to be extinguished in a variety of ways, of which the following are the chief:—

1. By unity of seisin or ownership, that is by the dominant and the servient tenements both coming into the same ownership. Thus if A, as the owner of Whiteacre, has a right of way over Blackacre, and buys up Blackacre, the right of way is extinguished, for he cannot claim it against himself; and if he then sells Blackacre, there is no renewed right of way.

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[1] *Corporation of London* v. *Rigg* (1880), 13 Ch. D., 798; 49 L. J., Ch., 297; 42 L. T., 580.

[2] *Packer* v. *Welstead* (1657), 2 Sid., 39, III.

[3] Ante, p. 30.

[4] 8 & 9 Vict., c. 20.

[5] *Great Western Railway Co.* v. *Bennett* (1867), L. R., 2 H. L., 27; *Gerard* v. *London and North Western Railway Co.* (1895), 1 Q. B., 459; 64 L. J., Q. B., 260; 72 L. T., 142.

[6] *Elliot* v. *North Eastern Railway Co.* (1863), 10 H. L., 356.

But this principle does not, as is recognized in *Sury* v. *Pigot*[1], apply to rights *ex jure naturæ*. Thus if a stream rises on and flows through A's land, then through B's land, and from thence falls into the sea, and A buys up B's land, he can then divert the course of the stream; but if he afterwards, before such diversion, sells the land he bought from B, he will have no right to interfere with the flow of the water. Not only easements of convenience, but also easements of necessity are extinguished by unity of seisin, though as to the latter, on a new severance, a new easement of necessity may arise, on the principle of a new implied grant.

2. By the owner of the dominant tenement executing a deed releasing the servient tenement from the obligation.

3. By the abandonment of the enjoyment of the easement by non-user. This may occur in continuous as well as in discontinuous easements. Thus, in one case A had an easement of light. He pulled down the wall containing the windows and built it up again without windows. After 17 years he tried to assert that he still had a right to light, by opening a window and endeavouring to prevent an adjoining landowner from building, but it was held that his right was extinguished[2]. Whether an easement has or has not been extinguished by abandonment must be determined from the circumstances of each particular case[3], and it is sometimes, therefore, very difficult to determine whether a right of way has, or has not, come to an end through the right not having been exercised for a considerable time. However,

Moore v. *Rawson.*

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[1] Ante, p. 130.

[2] *Moore* v. *Rawson* (1824), 3 B. & C., 332.

[3] *Smith* v. *Baxter* (1900), 2 Ch., 138; 69 L. J., Ch., 137; 82 L. T., 650; where A on rebuilding replaced the apertures for his ancient lights, but in part boarded them up and placed shelves against other parts, but as that light still passed into the new building in ample quantity, it was held there was no abandonment.

the public will not by non-user lose their rights to a way once dedicated to them[1].

4. By the cessation of the purpose for which the easement was created, or of the necessity which caused its existence. Thus, in one case a company was incorporated for the purpose of making a canal, and made a cutting and erected on it a waterwheel for pumping water into the canal. The canal was afterwards, under an Act of Parliament, stopped up and converted into a railway, and it was held that on the conversion of the canal into a railway, the right of the company to the flow of the water in the cutting for driving the wheel ceased[2]. In the case of a right of way by necessity, if at a subsequent period the party entitled to the right can get to the place to which the way led by passing over his own land, or a public road that has been made, the former right of way ceases[3]. *National, &c Company* v. *Donald.*

5. By Act of Parliament. This may be either by its express terms, or by necessary implication, *e.g.*, where a statute authorizes certain works to be done on land which are inconsistent with the existence of a right of way[4]. It may be observed that an easement is an interest in land, for the invasion of which compensation may be claimed under the provisions of the Lands Clauses Consolidation Act 1845.

Interference with easement.

Where a person entitled to an easement is unlawfully interfered with in his enjoyment of it, he may abate the interference if he can do so peaceably. His proper and usual remedy is, however, an action for an injunction, or for damages, or both. Whether the Court will grant an injunction or simply give

[1] *Dawes* v. *Hawkins* (1860), 8 C. B., N. S., 848.
[2] *National Guarantee Manure Co.* v. *Donald* (1859), 4 H. & N., 8.
[3] *Holmes* v. *Goring* (1824), 2 Bing., 84.
[4] *Yarmouth Corporation* v. *Simmons* (1878), 10 Ch. D., 518; 47 L. J., Ch., 792; 38 L. T., 881.

damages is a matter in its discretion. In a proper case the Court will even grant a mandatory injunction, *e.g.*, ordering the pulling down of a building which has been erected, and which obstructs the plaintiff's lights. The Court in exercising its discretion as to granting or refusing an injunction will be guided by the conduct of the parties, and will consider whether the plaintiff has been guilty of any laches, and will also pay regard to the comparative injury caused in point of value, and damage, to each party[1].

Prescription. It has been stated that a title either to a right of common, or an easement, may be acquired by prescription, a matter deserving some special attention. By a prescriptive title is meant the right to an incorporeal hereditament acquired by enjoyment had during the time, and in the manner, fixed by law[2]. It rests on the basis of a presumed grant, in which respect it differs from a claim based upon custom, which stands merely on immemorial usage, irrespective of any grant, and such custom, complying with certain well-established requirements, has the effect of, and in fact constitutes, part of our law.

A prescriptive title must be claimed by a definite person. Consequently a fluctuating body, *e.g.*, inhabitants of a parish, cannot prescribe for the right to dance, or play games, or hold horse races, or to dry nets, upon a close, though they may claim such rights by custom[3].

A title by prescription at Common Law must be claimed either as (1) being in a man, and those whose

[1] Tudor's Conveyancing Cases, 799, 800. As to Injunctions generally, see Indermaur & Thwaites' Equity, 452-478.

[2] Gale on Easements, 164.

[3] *Abbot* v. *Weekly* (1677), 1 Lev., 176; *Fitch* v. *Rawling* (1795), 2 H. Bl., 393; *Mounsey* v. *Ismay* (1865), 3 H. & C., 486; 34 L. J., Ex., 52; *Mercer* v. *Denne* (1905), 2 Ch., 538; 74 L. J., Ch., 723; 93 L. T., 412.

estate he hath in certain lands, which is called prescribing in a *que estate*, or (2) in a man and his ancestors. And here this distinction as to the subject matter of the claim must be made, that if a man prescribes in a *que estate* nothing is claimable by this prescription but such things as are appendant or appurtenant to land, for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he founds his claim as being in himself and his ancestors, the claim may consist of anything that might have been the subject of a grant[1]. *Que estate.*

The theory of a prescriptive title seems almost to have been a necessity. A person was found exercising rights over the land of another which he could never have acquired but by grant, and by reason of lapse of time, and other circumstances, he was unable to prove that grant. The natural presumption would be that, there having been a long enjoyment of the right, it must have had a legal origin if such an origin were possible[2]. Very naturally, however, the principle was restricted in various particulars, and the main difficulty was the point of what length of time was necessary to give a right in this way. As to this point the position is now very different from what it was formerly, but other rules remain the same to-day as they always were, and some of these rules must be noticed :— Theory of prescription.

1. The right in question must not merely have been long claimed, but it must also have been actually exercised and enjoyed[3]. Rules affecting prescription.

2. This exercise or enjoyment must have been

[1] 1 Stephen's Commentaries, 466.

[2] See this principle enunciated in *Phillips* v. *Halliday* (1891), A. C., 231; 64 L. T., 745 : 55 J. P., 741.

[3] *Smith* v. *Baxter* (1900), 2 Ch., 138; 69 L. J., Ch., 137; 82 L. T., 650.

constant and peaceable. As a general rule when the right has been subject to interruption, or dispute, no title by prescription arises, for the very circumstances would rebut the presumption of a grant, and would rather lead one to conclude that an attempt was being made to acquire something against the will of another.

3. The right claimed must be both a certain and reasonable one. Thus a claim to take by prescription from another's land so much clay as is necessary to make a certain number of bricks will be good, but not a claim to take so much as may be necessary for making bricks generally.

4. The right must have been exercised openly and without secrecy[1], and not under any licence from the owner of the servient tenement.

5. The right cannot be good if it is contrary to the express provision of any Act of Parliament[2].

Time necessary at Common Law to confer a prescriptive title.

We now come to the question of what length of enjoyment will be sufficient to give a good prescriptive title to a right which complies with all the foregoing rules. The point was one of natural difficulty, and the Courts at a very early period settled it, for the time being, by laying down the rule that, for a claim by prescription to be good, it must be shewn to have been in existence before the commencement of the reign of Richard I., 1189. This rule was arrived at by an equitable extension of a statute which had fixed that as the date for alleging seisin in a real action[3], and is a rule, therefore, not directly enacted by statute, but adopted by analogy to a statute[4]. This rule may have been, to a certain extent, reason-

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[1] *Union Lighterage Company* v. *London Graving Dock Company* (1902), 2 Ch., 557; 71 L. J., Ch., 791; 87 L. T., 381.

[2] Tudor's Conveyancing Cases, 759.

[3] Statute of Westminster, 3 Edw. I., c. 39.

[4] Gale on Easements, 188.

able enough when first laid down, and it got over the difficulty then; but it possessed no flexibility, and as time went on still remained the same, and the fixed date of 1189 came to be called the period of "legal memory" or the time "beyond which the memory of man runs not to the contrary," and was what was understood when it was stated that a right had existed from "time immemorial." The rule, therefore, which was not a very good one to start with, became in course of time an absurd one, and the Courts were obliged to have recourse to ingenuity to prevent it becoming absolute nonsense. They, therefore, expressed themselves satisfied if proof of enjoyment was given as far back as living witnesses could speak, and, there being no one to contradict these witnesses, they then presumed that the right had been enjoyed for the necessary legal period. Still this did not meet all the difficulties, for it might be possible for the person against whom the right was set up to shew that, though it had been long enjoyed, it must have originated within the period of legal memory, or that it must have been at some time extinguished by unity of possession, etc. Therefore, about the year 1760, the judges resorted to a clumsy but ingenious theory, of there having been a grant which had been lost. They laid it down that if evidence was given of enjoyment for the reasonable period of 20 years, there was a strong presumption that there must have been a grant of the right at some antecedent period, although that grant could not be proved, and they directed juries, on such evidence, to find that there had been such a grant, and that there was therefore a good prescriptive title. But all this was eminently unsatisfactory as being merely ingenious fiction, and besides the objection of its being well known that the plea of there having been a grant which had been lost was unfounded in fact, the claim by prescription was often

Legal memory.

Theory of lost grant.

frustrated by proof of the title of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the pleading. The Courts were, in fact, acting upon a theory that would not always work in with the common law rule. It is not, therefore, to be wondered at that at last the subject received the attention of the Legislature, and that an Act of Parliament was passed for the substitution of certain definite periods for the old period of "legal memory," and the fictional idea of a lost grant.

Prescription Act 1832.

This statute was the Prescription Act 1832[1], and it is upon its provisions that the law as to the period necessary to confer a good prescriptive title, either to a right of common, or an easement, or light to a building, rests at the present day. It must be carefully noticed that it does not render good any custom or right which in its nature would have been bad at common law, but simply deals with the point of the period of enjoyment necessary to confer a good title.

Rights of common.

Dealing firstly with rights of common, it enacts[2] that no claim of this kind, which might lawfully be made at Common Law, and which has been enjoyed as of right and without interruption for the full period of 30 years, shall be defeated by merely shewing that such right was first taken or enjoyed at any time prior to such period of 30 years; and that when such right shall have been so enjoyed for 60 years, it shall be deemed absolute and indefeasible, unless it shall appear that it has been exercised by some consent or agreement by deed or in writing.

Easements.

Dealing next with easements generally, it enacts[3] that no claim to any easement, which might lawfully

[1] 2 & 3 Wm. IV., c. 71.
[2] Ibid., sec. 1.
[3] Ibid., sec. 2.

have been made at Common Law, and which has been enjoyed as of right[1] and without interruption for the full period of 20 years, shall be defeated by merely shewing that the right was first taken or enjoyed at any time prior to such period of 20 years; and that when such easement shall have been so enjoyed for 40 years it shall be deemed absolute and indefeasible, unless it shall appear that it has been exercised by some consent or agreement by deed or in writing. Dealing lastly with the particular easement of light to any dwelling-house, workshop, or other building[2], it provides[3] that where it shall have been actually enjoyed for the full period of 20 years without interruption, it shall be deemed absolute and indefeasible, unless it shall appear that it has been enjoyed by some consent or agreement by deed or in writing[4]. It is then enacted[5], with regard to the respective periods of years prescribed by the Act, that they shall each be taken to be the particular period next before[6] some suit or action wherein the claim to which the period may relate shall have been, or shall be, brought into question; and an explanation is given of what is meant by the expression "interruption," by providing that nothing shall be

Light.

Interruption.

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[1] Where A had used a way for carts to his premises through B's yard for over 40 years, and had regularly paid B 15s. a year, it was held that A had not enjoyed "as of right," and had gained no title under the Prescription Act (*Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), A. C., 229; 72 L. J., Ch., 558; 88 L. T., 698).

[2] No easement of light can be claimed except on account of buildings. Thus A had a timber yard and saw-pit, and had been in the enjoyment of the light passing laterally over B's ground to his saw-pit for more than 20 years. B then built and obstructed the light, and it was held he was entitled to do so (*Roberts* v. *Macord* (1832), 1 Moo. & Rob., 230). See also *Potts* v. *Smith* (1868), 38 L. J., Ch., 58; *Harris* v. *De Pinna* (1886), 33 Ch. D., 238; 56 L. J., Ch., 344; 54 L. T., 770.

[3] 2 & 3 Wm. IV., c. 71, sec. 3.

[4] Under this enactment a right is gained though the owner of the adjoining property be the occupier, and be for the whole period under disability to grant. (Per Parke, B., in *Harbidge* v. *Warwick* (1849), 3 Ex., 556.)

[5] 2 & 3 Wm. IV., c. 71, sec. 4.

[6] *Hyman* v. *Van den Bergh* (1908), 1 Ch., 167; 77 L. J., Ch., 154.

deemed an interruption unless it shall have been submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have, notice thereof and of the person causing it. As regards the computation of the before-mentioned periods necessary to constitute a prescriptive period, there is also a proviso as regards disabilities, it being enacted[1] that the time during which any person, otherwise capable of resisting any claim shall have been an infant, idiot, *non compos mentis*, or tenant for life, or during which an action shall have been pending and diligently prosecuted in respect of the matter, shall be excluded from the computation, *except* in those cases in which the right is declared to be absolute and indefeasible. To protect reversioners, who otherwise might find easements established against them by the neglect of their tenants, it is also provided[2] that where property over which an easement (other than light) has been enjoyed, has been held under a term for life or more than three years, the time of the enjoyment of such easement during the continuance of such term shall be excluded from the period of 40 years, in case the claim shall, within three years next after the determination of the term, be resisted by any person entitled to any reversion[3] expectant on the determination thereof.

Disabilities.

Reversioners.

The main points to be observed in the Prescription Act are: (1) that 30 years give a primary right to

[1] 2 & 3 Wm. IV., c. 71, sec. 7.

[2] Sec. 8. There is a question as to whether this section applies to all easements or not, as the wording is peculiar, which is accounted for by there having probably been a mistake in printing. It is submitted that, on the principle of liberal construction, it should be taken as applying to all easements except light; it would appear that it cannot apply to light, as, irrespective of the mistake in printing, 40 years is the only period mentioned in the section. (See hereon Gale on Easements, 202.)

[3] Reversion here does not include remainder (*Symons* v. *Leaker* (1885), 15 Q. B. D., 629; 54 L. J., Q. B., 480; 53 L. T., 227).

commons, and 20 years to easements generally, but that disabilities may defeat the right; (2) that 60 years give an absolute right to commons, and 40 years to easements generally; (3) that 20 years give an absolute right to light, notwithstanding disabilities; (4) that an agreement in writing may prevent the right being gained; (5) that in the case of a reversioner, he has as regards easements, other than light, a further period given him for his protection.

The statute does not take away previous right.

It may be noticed that this statute has not taken away the common law mode of proving a claim either by strict prescription, or by the theory of a lost grant; it has merely given additional facilities, and has not deprived a party of any right he would have possessed had the Act never been passed[1]. This, however, is more a technical than a practical point, as it is manifestly easier, as a rule, to found a claim to a right of common, or an easement, under the statute than under the Common Law.

No right of way or other easement can be gained under section 2 by one tenant against another tenant of the common landlord, for the enjoyment must be as of right[2]. But a right of light can be gained under section 3 by one tenant against another tenant where the reversion is not in the Crown, as the right simply depends on actual enjoyment, and when acquired attaches to the fee simple in the dominant tenement against the fee simple in the servient tenement[3].

Submission to an interruption.

The point of what will constitute an "interruption" within the Act is one of great importance. It must be for a year, and it must have been submitted to or

[1] Tudor's Conveyancing Cases, 791; *Colls* v. *Home and Colonial Stores* (1904), A. C., 179; 73 L. J., 484; 90 L. T., 687.
[2] *Kilgour* v. *Gaddes* (1904), 1 K. B., 457; 73 L. J., K. B., 233.
[3] *Frewen* v. *Phillips* (1861), 11 C. B., N. S., 449; *Morgan* v. *Fear* (1907), A. C., 425; 76 L. J., Ch., 660; 97 L. T., 591.

acquiesced in, and whether this is or is not the case, is a question of fact for a jury. In order to negative submission or acquiescence, it is not necessary that the party interrupted should have brought an action, or taken any active steps to remove the obstruction; it is enough to shew that he has in a reasonable manner communicated to the party causing the interruption the fact that he does not really submit to, or acquiesce in it[1]. It is a question of fact for a jury, and must depend upon the circumstances of each particular case. Thus, in one case in which a right to light was in question, the plaintiff proved the enjoyment of such light for more than 20 years but for what was alleged to be an interruption during the last 13 months preceding the action. This alleged interruption consisted of the defendant having erected on his land a shed which interfered with the light. Evidence was given that during these 13 months the plaintiff had more than once complained to the defendant of such interruption, and had protested to the defendant against the shed being there. The Court held this was evidence on which the jury might find that the interruption had not been submitted to or acquiesced in by the plaintiff, and that it therefore in fact constituted no interruption within the statute[2]. It will be observed that in this case there were not mere grumblings and general expressions of dissent, but there was direct complaint, and protest, to the party causing the obstruction. Suppose, therefore, that A puts out a window deriving light from B's land, it is by no means safe for B to wait a long time, thinking it will be sufficient to obstruct the light for a year just within the 20 years, for A may protest and thus shew he does not submit or acquiesce, and may gain a prescriptive title notwithstanding the obstruction.

Glover v. *Coleman.*

[1] Tudor's Conveyancing Cases, 763.
[2] *Glover* v. *Coleman* (1874), L. R., 10 C. P., 108; 44 L. J., C. P., 66.

B should very soon put up his obstruction, and then if it remains it will be impossible for A to get a prescriptive right, for, irrespective of the technical interruption within the Act, there has been an actual interruption, and B can get no prescriptive title, because he will not have had 20 years' enjoyment of light. It may also be noticed that to constitute any interruption at all, it must be real and permanent, and not fluctuating; it is no good to merely erect a temporary obstruction every now and then. In one case the obstruction consisted of piling up old packing cases, which varied in height on different occasions, as some were taken away, and others brought in. It was held that this was not a sufficient obstruction, or interruption, to prevent the plaintiff acquiring a prescriptive title, though it was admitted by the Court that the packing cases might have been put up in a permanent pile so as to constitute a sufficient interruption[1].

Presland v. *Bingham.*

The provision of the Act, that each of the prescribed periods shall be taken to be the particular period next before action brought, naturally produces the result that no prescriptive title under the Act can be acquired unless an action is actually brought[2]. Where an easement has once been enjoyed as of right, such enjoyment must be taken for the purposes of the Act to continue, though interrupted, unless the interruption be acquiesced in for a year[3]. It therefore follows that the enjoyment of an easement for 19 years and a fraction of a year will establish a right to it, provided the action is brought before the interruption has continued the full period of a year, but after 20 years have elapsed since the commencement of the enjoyment[4].

No title under the Act until an action is brought.

[1] *Presland* v. *Bingham* (1889), 41 Ch. D., 268; 60 L. T., 433.
[2] *Wright* v. *Williams* (1836), 1 M. & W., 77.
[3] Tudor's Conveyancing Cases, 767.
[4] *Flight* v. *Thomas* (1841), 8 Cl. & F., 242.

Crown.

It may be observed that a prescriptive right to light cannot be claimed against the Crown, for before the passing of the Prescription Act no presumption of a lost grant would have been made against the Crown, and there is nothing in the particular section dealing with light which alters this rule, though other claims under the Act are expressly declared to bind the Crown[1].

Colls v. *Home and Colonial Stores.*

The extent of the easement of light was discussed by the House of Lords in *Colls* v. *Home and Colonial Stores*[2]. The owner of a building on one side of a street 40 feet wide, who had acquired an easement of light to a window on the ground floor, sought an injunction to prevent the opposite owner from erecting a house which when erected would not be of the same height as his own, on the sole ground that the new building would diminish the light which had come to his window for over 20 years. It was admitted that defendant's building would diminish the light, but proved that it would in fact leave sufficient light for all ordinary business purposes. The action was dismissed. And it was laid down that neither at Common Law nor under the Prescription Act, is the owner of ancient lights entitled to all the light he has enjoyed; but that when his light is diminished by building operations, it is *damnum absque injuriâ* so long as there is no nuisance, *i.e.*, so long as enough light is left for the comfortable enjoyment of the property as a dwelling-house or its beneficial user as a place of business. So that even where the owner of the dominant tenement has, to the knowledge of the owner of the servient tenement, for upwards of 20 years carried on a business requiring

[1] *Perry* v. *Eames* (1891), 1 Ch., 658; 60 L. J., Ch., 345; 64 L. T., 638.

[2] (1904) A. C., 179; 73 L. J., Ch., 484; 90 L. T., 687; see also *Jolly* v. *Kine* (1907), A. C., 1; 76 L. J., Ch., 1; 95 L. T., 656; *Higgins* v. *Betts* (1905), 2 Ch., 210; 74 L. J., Ch., 621.

an extraordinary amount of light and has in fact enjoyed such light, he has not acquired any prescriptive right to extraordinary light[1]. *Ambler* v. *Gordon.*

There have been several attempts to establish a rule of 45 degrees—by which it is contended that if the angle of incidence of light over the roof of a new building to the bottom sill of the dominant owner's lowest window is 45 degrees, there is no obstruction to light. But this rule was based on a misconception of section 85 of the Metropolis Management Act 1862, and at most it only affords rebuttable evidence that there is no substantial interference with the dominant owner's light[2]. Angle of 45 degrees.

The whole subject of rights of common, and easements, together with prescription, is one of considerable difficulty, and for a complete understanding of these matters considerable study is necessary. The foregoing remarks will, however, it is hoped, give the student a fair general knowledge upon the subject[3].

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[1] *Ambler* v. *Gordon* (1905), 1 K. B., 417; 74 L. J., K. B., 485; 92 L. T., 96.

[2] *Colls* v. *Home and Colonial Stores* (1904), A. C., 179; 73 L. J. 484; 90 L. T., 687.

[3] The student is advised to read the notes to *Tyrringham's Case*, and *Sury* v. *Pigot*, in Tudor's Conveyancing Cases.

CHAPTER VI.

THE RIGHT OF THE INDIVIDUAL TO ALIENATE, AND THE MODES OF ALIENATION GENERALLY.

Original position.

To our minds, at the present day, the idea of the right of alienation is inseparable from that of ownership. As regards purely personal property, this right of alienation, at any rate *inter vivos*, must always have existed, though subject sometimes to the control of might which has so often overruled right; but, as regards land, the right did not exist, for our land laws are based on feudal ideas, and the notion of dealing with a feud as the tenant chose was certainly opposed to the principles of the feudal system. It is feudalism, therefore, that we must take as our starting point with regard to land, and from thence trace matters down to the present time. In this chapter it is proposed to deal generally with the alienation by the individual of both personalty and realty, (1) by act *inter vivos;* (2) by will.

1. Alienation by act *inter vivos.*

The natural mode of alienation of a chattel has always been, as it is now, by delivery over of the chattel. Nothing more can be wanted, but even by a mere contract to sell a chattel, it is quite possible that the property in it may pass without delivery. Complete alienation of a chattel, therefore, may be effected by mere delivery, if it is intended thus to alienate, or by contract without delivery. This is a subject to be considered when studying the "contract" portion of our common law principles, and attention has there specially to be given to

contracts for the sale of goods[1], pledges[2], and bills of sale[3], although the latter subject is necessarily dealt with hereafter in treating of mortgages[4], and incidentally also in connection with settlements[5], and also the assignment of choses in action[6]. With regard to leasehold property, which it must be remembered is also personalty, that equally appears, from very early times, to have been capable of alienation by act *inter vivos*, either by the creation of a partial interest thereout by means of underlease, or by the passing away of the entire interest by assignment or surrender. There is little in the nature of legal history with which we need concern ourselves as regards the alienation of personal property by act *inter vivos*.

Alienation of realty.

Turning to real property, we find that in the early feudal times there was certainly no independent right to alienate at all. The true feudal estate was the life estate, and it was contrary to the principles of feudalism that the tenant should be allowed at his own pleasure to put another in his place. He could do so with the lord's consent, the alienee duly attorning tenant to the lord, but that was all, and, notwithstanding the extension of the feudal grant to "heirs," the position remained the same. There is this to be said for the principle, it was reciprocal, so that the lord could not alienate his seignory without the consent of the tenant, who, if he did consent, duly attorned to the new lord. In course of time, however, the strict feudal rule forbidding alienation was relaxed, and gradually the right of alienation was established, a right which was thoroughly

Attornment.

[1] See Indermaur's Common Law, Part I., Chap. IV.
[2] Ibid., 124.
[3] Ibid., 114.
[4] Post, Chap. XIV.
[5] Post, Chap. XV.
[6] See Indermaur's Common Law, 165.

recognized by the Statute of *Quia Emptores*, the charter which permitted the free alienation of a fee simple[1].

Statute of *Quia Emptores*.

Before this statute we must, however, remember that the right of alienation by a freeman was already established. The principle of this alienation was subinfeudation, a system of perpetually underletting the fee simple by which the alienor always created a new feud and became in his turn a lord. This system of alienation worked to the detriment of the chief lords, who thereby found themselves deprived of many of the ordinary feudal incidents, which, instead of coming to them, went to the *mesne* or intermediate lords. This was the true reason for the Statute of *Quia Emptores* being passed; it was not that there was any desire to authoritatively declare that people could alienate their lands, but it was desired to put a stop to the way in which such alienation took effect. The statute provided, in general terms, that every freeman could alienate his fee simple at pleasure, but so only that the alienee should hold of the chief lord of the fee, and not of the immediate grantor. In other words, it abolished subinfeudation. It was a declaratory statute so far as it dealt with the power to alienate, and it was a remedial statute so far as it dealt with the mode in which the alienee took. Thus, if A being a fee simple owner conveyed to B in fee simple, before the statute B would have held of A, whereas since the statute this is no longer the case, but B holds of the chief lord, *i.e.*, now (practically always) of the Crown. There is no longer, therefore, on the alienation of a fee simple estate, any seignory or lordship existing in the grantor, and it follows that since the statute no manor can have been created except by a

[1] 18 Edw. I., c. 1.

grant from the Sovereign or by Act of Parliament, as it is an essential feature of a manor that there should be at least two freehold tenants in fee simple holding from the lord of the manor. The statute, therefore, ancient as it is, establishes an important principle bearing on the alienation of land at the present day.

Copyholds.

But though there was thus at an early date a right to alienate freehold land, there was certainly no such right as regards land held in villenage. If the villein desired to alienate, he humbly surrendered his land to the lord, who admitted the new tenant if he thought fit, and declined to do so if he did not approve of him. The Statute of *Quia Emptores* only applied to alienation by freemen, and not by villeins. In course of time villenage became transformed into copyholds, and a right to alienate sprang up by custom. At the present day a copyholder can freely alienate, but the ancient mode of alienation by surrender and admittance is still used, a fact that reminds us forcibly of the original position. As regards the creation of copyholds, the estate of the copyholder depending on the custom of the manor, and a custom being necessarily of immemorial antiquity, it follows that, ordinarily, there can be now no new creation of copyholds. But a lord of a manor, to whom copyholds escheat, may make a fresh grant of them as copyholds. And in most manors there is a special custom that the lord may, with consent of the majority[1] of the homage, grant out portions of the waste lands, to be held as copyholds; but now[2] this can only be done with the previous consent of the Board of Agriculture, and the land so granted at once ceases to be of copyhold

As to creating new copyholds.

Copyhold Act 1894.

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[1] *Ramsey* v. *Cruddas* (1893), 1 Q. B., 228; 62 L. J., Q. B., 269.
[2] 57 & 58 Vict., c. 46, sec. 81.

tenure and becomes freehold. The practical effect seems to be to restore subinfeudation on a very small scale.

Modes of alienation.

Having thus seen the establishment of the right of alienation, we have next to consider the modes of alienation. Incorporeal hereditaments were always conveyed by deed of grant, but this was not the case as to corporeal hereditaments. The earliest mode of

Feoffment.

conveyance of a corporeal hereditament—that is, freehold land in possession—was by a feoffment, which was the ancient feudal donation, and was perfected by livery of seisin, which might be either livery in deed, or livery in law. It possessed the important element of publicity, and seems to have been a very natural primitive mode of conveyance. In its original state it could be effected orally in the presence of witnesses, but by the Statute of Frauds signed writing was made essential[1]. A feoffment has long been in general an obsolete mode of conveyance, but should it be adopted, it must now be evidenced by deed[2], except in the one case of a feoffment made by an infant of at least 15 years of age, under the custom of gavelkind[3]. Here then is the one remaining possible advantage of a feoffment. We must, however, look at it as originally being the normal method of conveying freehold land in possession for whatever estate it might be held. As matter of history, it is also well to notice that a feoffment might formerly have had a tortious operation, *i.e.*, a person enfeoffing another for an estate greater than he had, would technically pass that greater estate; not that any good would usually ensue, as to enfeoff another of a greater estate than the feoffor had, caused a forfeiture to the lord. Such

Tortious operation.

[1] 29 Car. II., c. 3, sec. 1.
[2] 8 & 9 Vict., c. 106, sec. 5.
[3] Ante, p. 8.

a thing could never have happened in the conveyance of an incorporeal hereditament, for that was conveyed by deed, which would be ineffectual to pass more than the grantor had. Whilst a feoffment, therefore, might operate by wrong, a deed of grant was said to be an innocent conveyance. However, the doctrine of a feoffment operating by wrong was abolished by the Real Property Act 1845[1].

Inconvenience of feoffment.

The actual entry on the land which was necessary in the case of a feoffment, and which formed part and parcel of the transaction, was manifestly an inconvenience, to say nothing of the publicity attending it, which many would wish to avoid. It is not, therefore, to be wondered at that lawyers sought for another mode of conveyance, and they found what they desired ready to their hands as soon as the Statute of Uses was passed. Suppose before that statute A agreed to sell his land to B, who paid for it, though A still, until he enfeoffed B, remained possessed of the legal estate, he certainly would be compelled by the Court of Chancery to hold the land for the benefit of B. Though, therefore, A remained the legal owner, B was in effect the equitable or beneficial owner—he had the "use" in the land. The Statute of Uses[2] provided that he who had the use should have the legal estate, and therefore it was manifest that, by force of the statute, in the instance given above, B became under the bargain and sale the actual legal owner. Here then was a new mode of conveying land, viz., by bargain and sale; it saved a journey to take the possession which was essential to a feoffment, and it also possessed the attribute of privacy. That there should thus spring into existence a new mode of conveying land was, no

Bargain and sale.

[1] 8 & 9 Vict., c. 106, sec. 4.
[2] 27 Hy. VIII., c. 10. See ante, p. 49.

doubt, never thought of by the framers of the Statute of Uses, and yet it was a very logical result of that enactment. That the statute had produced this result was at once perceived, and as the evil of this new mode of conveyance was considered to be its secrecy, another statute was immediately passed requiring enrolment with the *custos rotulorum* of every bargain and sale of freehold[1]. Here then was established a new mode of conveying land which many would resort to in preference to a feoffment, because of its greater convenience. Still there was attached to it the publicity of enrolment, and it was this circumstance that gave rise to another new mode of conveyance, viz., what is known as a lease and release.

tatute of nrolments.

Before we consider this lease and release operating under the Statute of Uses, we must refer to a common law lease and release, a mode of conveyance of long standing, adopted necessarily under certain circumstances, but possessing no peculiar advantage. It consisted of a grant first of an estate for life or years, and then, after the tenant had entered, of a conveyance by deed (called a release) of the reversion. A particular estate being first created, the residue left in the grantor was an incorporeal hereditament, which naturally could be conveyed by deed, and this deed was styled a release because it conveyed a further interest to a person who was already in possession. There was ordinarily no advantage in having recourse to a common law lease and release as a mode of conveying an estate, because there was the necessity of entry under the lease. But if it happened that a lease had first been granted, and then it was desired to vest the residue of the estate in the lessee, naturally a release would be the

ommon Law ease and elease.

[1] 27 Hy. VIII., c. 16.

instrument used, as there could be no occasion for a new and distinct delivery of the seisin.

Release.

The ordinary lease under which the tenant entered was, therefore, a common law mode of dealing with land, and so was the release, but the common law conveyance known by the general term of release was so extensive in its modes of operation, that it deserves a few passing words of explanation. The release just mentioned was said to operate by way of enlarging the estate of the lessee. But then a release was also the name applied to the instrument by which one co-parcener conveyed to another, and in this case it was said to operate by way of passing an estate; each and all were seised, and the one co-parcener released to the other. Equally would this be the case if one of several joint tenants desired to convey to another. But a release could not be used if one tenant in common wanted to convey his share to another, because each was seised of his own share only and not of the whole land. At the present day we say that a co-parcener, or a joint tenant, conveys to another co-parcener or joint tenant by deed of release. Again, a release might operate by way of passing a right, as if a man were disseised, or turned out of his estate, and then gave up all his rights to the person who had thus disseised him. A release may be used for accomplishing any of these purposes at the present day.

Lease and release under the Statute of Uses.

But it is necessary to return to the new mode of conveying land which came into existence after the passing of the Statute of Enrolments, and which we should never have seen but for that statute. It is styled a lease and release under the Statute of Uses, to distinguish it from the common law lease and release. It was noticed that the Statute of Enrolments only required bargains and sales of freeholds

to be enrolled, and did not speak of a bargain and sale for a year, or even a term of years. Nevertheless, if A, a fee simple owner, bargained and sold his land to B for one year, A was seised to the use of B for that year, and as B had the use, he was technically in possession for one year, by the operation of the Statute of Uses. Consequently the estate remaining in A was an incorporeal hereditament, which could properly be conveyed by deed of grant; and the appropriate name to apply to a deed which conveyed the ulterior interest in the land to the owner of the particular estate was "release," because it would operate by way of enlarging his estate. It was just the same in substance as the common law lease and release, except that under that, the tenant had actually to enter, whereas in this there was no need for actual entry, as the statute, operating on the use, produced a fictitious possession. The so-called lease and release under the Statute of Uses was therefore composed of two parts: (1) a bargain and sale, or, as it was styled, a lease, for a year; (2) a release of the reversion. Here people could well rest content for a while, for a convenient mode of conveying land had been discovered, which had neither the inconvenience nor publicity of a feoffment, nor the publicity of a bargain and sale of freeholds. In practice, it became the common and usual mode of conveying land, the whole transaction being carried out at one time, but the lease, or bargain and sale, being dated the day before the release. Further, it actually continued to be the mode of conveying land commonly used until the year 1841, when an Act was passed to do away with the absurdity of two deeds, and to render a release by itself sufficient without the necessity of a previous lease or bargain and sale[1]. It was absurd, however, to continue to

Act of 1841.

[1] 4 & 5 Vict., c. 21.

call the one instrument standing by itself a release, and this Act was repealed by the Real Property Act 1845, which provides that all corporeal hereditaments, as well as incorporeal, can be conveyed by deed of grant[1]. Here then we have an end to all distinctions as regards the direct conveyance of corporeal and incorporeal hereditaments; a deed of grant is now the proper mode of conveyance.

Real Property Act 1845.

The proper way then of considering the history of the alienation of land is to start with the feoffment, to pass from that to the bargain and sale, from thence to the lease and release, then to the release by itself, and to conclude with the deed of grant.

Summary of history.

It will be noticed that whilst a feoffment was a common law mode of conveyance and was said to operate by transmutation of possession, a bargain and sale, and a modern lease and release, were not common law modes of conveyance at all, but were conveyances under the Statute of Uses. Under those instruments, though the alienee got the legal estate, yet he got it not by force of the particular instrument, but by the operation of the Statute of Uses. If A enfeoffed B, B was in by the Common Law; but if A bargained and sold to B, B was in by the Statute of Uses. As regards other modes of conveyance known to the Common Law, the ordinary lease and release have already been referred to, and so also a deed of grant was a common law mode of conveyance, although after the passing of the Statute of Uses it could be made to operate under that statute. Thus, if A grants to X, this is a common law grant; but if A grants to B, to the use of X, this is a grant taking effect under the Statute of Uses. In both cases the result is the same, X gets the legal estate, but

Conveyances at Common Law, and under the Statute of Uses.

[1] 8 & 9 Vict., c. 106, sec. 2.

in the first instance he is in by the Common Law, and in the second instance he is in by the Statute of Uses.

Other modes of conveyance at Common Law.

It is well just to mention some other modes of conveyance known to the Common Law, and which, when used, are properly styled common law conveyances at the present day. There is an assignment of a leasehold estate in land. There is the surrender, which word is used sometimes to express that mode of conveyance by which the owner of a particular estate conveys to the person entitled in reversion, and at other times to express the ordinary mode of conveyance by a copyholder, whose surrender has to be completed by admittance. Then there was the exchange, though it is obsolete now. As to this it should be noticed that only lands equal in quantity of interest could be the subject of a common law exchange, thus a fee simple for a fee simple, but not for an estate for years. A common law exchange formerly implied a warranty of title, with a consequent condition of re-entry, but this was abolished in the year 1845[1]. Exchanges are, however, now effected either by mutual conveyances by the parties of their respective lands, the one to the other, or else under the provisions of the General Inclosure Act[2] by order under the seal of the Board of Agriculture. The old common law partition, the confirmation, and the defeasance, may also be mentioned, though they are now of no importance. The essential thing to remember now is, that land and all interests and estates therein are conveyed by deed of grant[3], and that the estates may sometimes vest in grantees by the Common Law, and sometimes by the Statute of Uses.

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[1] 8 & 9 Vict., c. 106, sec. 4.
[2] 8 & 9 Vict., c. 118.
[3] 8 & 9 Vict., c. 106, sec. 3.

In speaking of alienation and the modes of alienation generally, we have been mainly devoting our thoughts to the fee simple owner, or the tenant for life disposing of his life interest, or the leaseholder of his term of years, or the copyholder of his copyhold interest. We have now to look at the position of the tenant in tail, and of the tenant for life, as regards his capacity to alienate more than he is himself possessed of.

Estates tail.

The fee simple owner had a full right to alienate, as has been shewn, and if the estate were conditional —that is, granted to him and the heirs of his body— he acquired the same right as soon as he had inheritable issue. But when the Statute *De Donis* was passed and an estate tail was created[1] the tenant in tail had no right to alienate for longer than his own life, for under the statute the estate was bound to descend, on his death, to the issue *per formam doni*. For about 200 years this continued to be the case, and by that time the evils of strict entails were thoroughly seen. There was no probability of getting the statute repealed, and it was left to the ingenuity of lawyers to discover a method of overriding the statute, at any rate to some extent. In the famous *Taltarum's Case*[2] it was held in 1472 that by the process of bringing a fictitious action and getting the judgment of the Court that plaintiff should recover the land in fee simple, both the issue, and persons interested in remainder, were barred and defeated. The validity of the process to accomplish the desired end was no doubt at first questionable, but in course of time it soon became recognized as effective, and if a tenant in tail wished to bar his entail and convert his estate into a fee simple, he could do so by, as it was termed,

Taltarum's Case.

[1] Ante, p. 23.
[2] Y. B., 12 Edw. IV., 19.

"suffering a Common Recovery"[1]. This was completely effectual, and a statute of 1540 further provided that if a fictitious action was brought for this purpose, and then compromised by leave of the Court this—called a fine—also would operate partially to bar the entail, *i.e.*, it would bar the tenant's own issue, though not those interested by way of remainder. It created in fact a base or qualified fee simple. Thus grew up the system of recoveries and fines, and, strange as the notion of them may appear to the modern student, perhaps their origin is not quite as extraordinary as the fact that they continued to be used down to the year 1833, when was passed the Fines and Recoveries Act[2] which governs the matter at the present day.

Fines and Recoveries Act 1833.

Disentailing deed.

This Act recognizes the evils of strict entails, and also the absurdity of the fictitious action. It provides that an entail may in future be barred by a simple deed enrolled in Chancery (now in the Central Office) within six months from its execution. This deed takes the form of a grant by the tenant in tail to some nominee to hold to him in fee simple, freed and discharged from the estate tail, and all remainders, estates and powers, to the use of the grantor in fee simple[3]. The tenant in tail executing and duly enrolling this deed becomes possessed of a fee simple estate. If, however, the tenant in tail is not entitled in possession, but only in remainder after a prior life estate created by the same instrument as the estate tail, then it is necessary, for the deed to be completely effectual, that the consent of the "protector of the settlement" should be obtained[4]. Under the old law if a tenant in tail in remainder sought to bar his

[1] For a brief and intelligible explanation of a recovery see Jenks' Modern Land Law, 34.

[2] 3 & 4 Wm. IV., c. 74.

[3] For precedents, see 2 Prideaux, 482, *et seq.*

[4] 3 & 4 Wm. IV., c. 74, sec. 22.

entail, it was necessary that the first legal life tenant should be a party to the action, otherwise only a base fee would be created. He was, in fact, the natural protector of the settlement. The Act recognizes the wisdom of this protection, but instead of leaving the protector to be necessarily the first owner of a legal estate in the land, it also provides that any person or persons, not exceeding three, may be appointed protector, and if no person is appointed by the settlement, then the first tenant for life, legal or equitable, is the protector[1]. If the consent of the protector is not obtained, then a base fee only is still created by the disentailing deed. It is entirely in the discretion of the protector whether he gives or withholds his consent[2]; and this consent must be given by the disentailing deed, or by another deed executed before or with the disentailing deed, and enrolled before or with the disentailing deed[3]. It is impossible to bar an entail by a will, or by a mere contract to bar the entail, for there must be an enrolled deed[4]. If, however, a tenant in tail in remainder bars his entail without the protector's consent, and expressly covenants that he will hereafter, when the estate falls into possession, execute a new disentailing deed, this covenant can be specifically enforced against him, though not against his issue if he has died, nor against a remainderman[5].

Protector.

Bankes v. *Small.*

The office of protector is a personal one, so that if a tenant for life, being protector, assigns away his life estate, yet he remains protector[6]. If the protector becomes lunatic or of unsound mind, the Lord Chancellor, or judge in lunacy, is the protector in his

Office of protector personal.

Lunatic protector.

[1] 3 & 4 Wm. IV., c. 74, sec. 32.
[2] Ibid., secs. 36, 37.
[3] Ibid., secs. 42-46.
[4] Ibid., sec. 40.
[5] *Bankes* v. *Small* (1887), 36 Ch. D., 716; 56 L. J., Ch., 839; 57 L. T., 392.
[6] 3 & 4 Wm. IV., c. 74, sec. 22.

place. If the protector is convicted of treason or felony, or is an infant, or it is uncertain whether he is living or dead, the Court of Chancery is the protector[1]. A married woman, tenant for life, who is protector, acts by herself if entitled for her separate use[2].

Enlarging a base fee.

If a tenant in tail in remainder bars his entail without the protector's consent, and thus creates a base fee, such base fee is capable of being enlarged into a fee simple estate in any of the following ways :—

1. By a new disentailing deed made either with the protector's consent, or after the estate has fallen into possession[3].

2. By acquiring the ultimate remainder in fee simple, when the base fee is *ipso facto* enlarged into a fee simple absolute[4]. Any security, therefore, effected on the base fee becomes then a security on the fee simple absolute.

3. By the owner of the base fee going into possession on the prior estate or estates falling in, and holding peaceably for 12 years[5]. It will be observed that all this time there has existed the capability of barring the entail without any person's consent, and, therefore, this is a very natural enactment.

Copyholds.

We have seen that an estate tail may exist in copyholds[6]. If it does, it is barred by surrender; but if it is an equitable estate tail, it can be barred either by surrender, or by deed, the deed being, however, not enrolled in the Central Office, but entered on the court rolls. In the case of copyholds,

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[1] 3 & 4 Wm. IV., c. 74, sec. 33.
[2] Ibid., sec. 24 ; 7 Edw. VII., c. 18, sec. 3.
[3] Ibid., sec. 38.
[4] Ibid., sec. 39.
[5] 37 & 38 Vict., c. 57, sec. 6.
[6] Ante, p. 24.

if there is a protector his consent is given by a deed entered on the court rolls, or it may be given to the person taking the surrender, when the fact of the consent must be mentioned in the memorandum of surrender[1]. It should be noticed also, that if a tenant in tail in possession enfranchises by means of a deed of enfranchisement, this bars the entail, because the effect of the grant of the freehold is to entirely merge the copyhold estate and its limitations[2].

Deed of enfranchisement.

In the case of a quasi entail, that is, a grant to A and the heirs of his body during the life of B, the tenant in tail having really only an estate *pur autre vie* (though limited in a particular way), may bar the entail by a simple deed without any necessity of enrolment.

Quasi entail.

If money is directed to be invested in land to be settled so that any person would have an estate tail therein, such money can be disentailed by a deed enrolled in the central office within six months after execution[3].

Money.

We see, therefore, that though the statute *De Donis* is still in our statute book, its object and effect are greatly nullified. It is useless to give an estate direct to A and the heirs of his body, for it is simply putting him to the expense of a disentailing assurance to convert his estate tail into a fee simple. In practice, we find that where an estate tail is conferred, it is invariably preceded by a life estate, and then there is some good in making the remainder one in tail instead of in fee simple, for the entail cannot be effectually and completely barred without the protector's consent. Further, were it limited in fee

The use and effect of entailing.

[1] 3 & 4 Wm. IV., c. 74, secs. 50-54.
[2] *Ex parte London School Board, Re Hart* (1889), 41 Ch. D., 547; 58 L. J., Ch., 752; 60 L. T., 817.
[3] 3 & 4 Wm. IV., c. 74, sec. 71. For precedent, see 2 Prideaux, 486.

simple, there would at once be in the remainderman a vested fee simple estate, after which no estate could be limited (except indeed by way of executory interest), whereas, being limited in tail, other remainders over may be given on failure of the previous limitations. Thus in strict settlements we find the common limitation to be to the husband for life, and at his death to his first and other sons successively in tail. As a mode of keeping an estate in a family for any length of time with any degree of certainty an entail is useless, and where we find estates handed down in families from generation to generation it is not by the natural force of the statute *De Donis*, but by voluntary arrangement, by means of continued re-settlement of the property[1]. The student must, however, carefully bear in mind that as long as an entail remains unbarred the estate must and will descend strictly *per formam doni*.

Estates tail which cannot be barred.

The following estates tail are incapable of being barred:—

1. Estate tail after possibility of issue extinct[2].

2. Estate tail granted by the Crown as a reward for public services, the reversion to which is still in the Crown.

3. Estate tail created by Act of Parliament, which forbids the barring of the entail.

There was also formerly another exception, viz., an estate tail *ex provisioni viri*, which has, however, long been obsolete.

A tenant in tail, therefore, has now, if he is in possession, as full a power of alienation by instrument *inter vivos* as a tenant in fee simple, although he has to resort to a special mode of conveyance. If he is a tenant in tail in remainder, then he has not in

[1] As to which, see post, Chap. XV.
[2] As to which, see ante, p. 23.

himself a complete right to fully alienate. Further, it must be borne in mind that the Settled Land Act 1882 enables a tenant in tail, without barring the entail, to alienate by instrument *inter vivos* in the same way that a tenant for life can, but on such an alienation he does not receive the purchase money, but that remains subject to the entail until it is barred, and generally the provisions of the Act which are presently given in dealing with a tenant for life apply to all such tenants. The Act[1] specially confers these powers on a tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring the entail (but not including such a tenant in tail where the land in respect of which he is so restrained was purchased by Parliament in consideration of public services); a person entitled to a base fee; and even a tenant in tail after possibility of issue extinct.

Settled Land Act 1882.

A tenant for life could, unaided by statute, naturally only alienate his own interest, in the doing of which he merely created in his alienee an estate *pur autre vie*. He could not sell or convey more than he had got, and that was only a life estate. Furthermore, he could make no lease which would be binding on the persons interested after his death. This was manifestly inconvenient, and could not be for the advantage either of the persons interested in the estate, or of the community at large. It was common practice, therefore, in settlements creating life estates, to confer wide powers both of leasing and of selling, and in the years 1856 and 1877 Settled Estates Acts were passed to confer these powers without express words. These old statutes do not demand any particular attention here, beyond the remark that the provisions of the 1877 Act[2] still

Tenants for life.

[1] 45 & 46 Vict., c. 38, sec. 58.
[2] 40 & 41 Vict., c. 18.

apply to some exceptional cases not coming under the Settled Land Acts, viz., to a tenant in dower, and to a case where there is no person having the powers of a tenant for life and an infant is contingently entitled[1], and where a tenant for life has assigned his life estate for value and cannot obtain the concurrence of the assignee in a sale. But we must apply ourselves to the Settled Land Act 1882[2], which, as subsequently amended, is the Act governing the subject at the present day, and the main objects of which may shortly be said to be, to confer on a tenant for life a power of selling what he has not got, viz., the fee simple, and of making leases which will be binding on persons interested in reversion or remainder. The chief characteristics of the Settled Land Act powers are that they are compulsory, personal, and fiduciary[3].

Settled Land Act 1882.

For a proper understanding of this Act it is necessary first to notice what is meant by the expressions "settlement" "trustees of the settlement," and "tenant for life," which are constantly occurring.

What is a "settlement"?

The Settled Land Act 1882 provides that "settlement" in that Act shall mean any deed, will, agreement, Act of Parliament, instrument, or number of instruments, whether made before or after the Act, whereby land stands limited to persons in succession[4]. The Settled Land Act 1890[5] further provides that every instrument whereby a tenant for life, in consideration of marriage, or by way of family arrangement and not as a security for money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement, is to be

[1] *Re Sparrow* (1892), 1 Ch., 412.
[2] 45 & 46 Vict., c. 38, amended by 47 & 48 Vict., c. 18; 50 & 51 Vict., c. 30; 52 & 53 Vict., c. 36; and 53 & 54 Vict., c. 69.
[3] Post, pp. 169, 173.
[4] 45 & 46 Vict., c. 48, sec. 2.
[5] 53 & 54 Vict., c. 69, sec. 4.

deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning and operation of section 50 of the 1882 Act. To understand properly this provision, it is necessary to look at section 50 of the 1882 Act. It provides that the powers of a tenant for life under the Settled Land Acts are not capable of assignment or release, and do not pass to any assignee, but remain exercisable by the tenant for life notwithstanding any assignment of his interest under the settlement; but the rights of an assignee for value of the estate or interest of the tenant for life are not to be affected without his consent, except that (unless the assignee is actually in possession) his consent is not needed for the making of leases in conformity with the Act and without fine. Thus, suppose A is a tenant for life, and on his marriage he brings his life estate into his marriage settlement, the trustees to whom the life estate is assigned are assignees of A, the tenant for life, and cannot have the Settled Land Act powers which remain vested in A, but as the trustees are assignees for value, A's powers would be subject to the above-mentioned proviso; in other words, A, the tenant for life, though still having the statutory powers, could not ordinarily exercise them without the trustees' consent. This is inconvenient, and to do away with this inconvenience, the provision in the Act of 1890 was passed. This provision does not make the assignment in consideration of marriage, or by way of family arrangement, one of the instruments creating the settlement for all purposes, but only so as to exclude section 50 of the Act of 1882[1].

Settled Land Act 1882, sec. 50.

[1] *Re Keck & Hart's Contract* (1898), 1 Ch., 617; 67 L. J., Ch., 331; 78 L. T., 287; 46 W. R., 389; *Re Ducane & Nettlefold's Contract* (1898), 2 Ch., 96; 67 L. J., Ch., 393; 78 L. T., 458; 46 W. R., 523; *Re Mundy & Roper's Contract* (1899), 1 Ch., 275; 68 L. J., Ch., 135; 79 L. T., 583. These decisions are contrary to the view of North, J., in *Re Tibbitt's Settled Estates* (1897), 2 Ch., 149; 66 L. J., Ch., 660, which it is submitted is incorrect.

"Trustees of the settlement."

The Act of 1882 provides[1] that the "trustees of the settlement" for the purposes of the Settled Land Acts are to be: (1) Any persons who are for the time being under a settlement trustees with power of sale, or power to consent to a sale, or (2) if under a settlement there are no such trustees, then the persons, if any, who are by the settlement declared to be trustees thereof for the purposes of the Acts. Further, the Act of 1890 provides[2] that, where there are no trustees under the foregoing provision, then the following persons shall be deemed "trustees of the settlement," viz.: (1) Any persons who are for the time being under the settlement trustees with a power of sale or trust for sale of, or with power to consent to the sale of, *other* lands comprised in the settlement and subject to the same limitations[3], or (2) if there are no such persons, then any persons who are for the time being under the settlement trustees with a *future* power of sale or future trust for sale of, or with power to consent to the future sale of, the land.

Where there are no "trustees of the settlement" for the purposes of the Settled Land Acts, the Court can appoint trustees on application of any beneficiary by summons[4]. And this course must be taken if the tenant for life sells under a compound settlement, unless all the beneficiaries are *sui juris*[5]. A compound settlement usually consists of a settlement, a disentailing deed, and a resettlement. Thus, A marries B and conveys freeholds to himself for life subject to a pin-

Compound settlement.

[1] 45 & 46 Vict., c. 38, sec. 2 (8).

[2] 53 & 54 Vict., c. 69, sec. 16.

[3] *E.g.*, Lands bought by trustees with money bequeathed to them for the purpose which are to be held on the same trusts as settled lands (*Re Moore* (1906), 1 Ch., 789; 75 L. J., Ch., 342; 95 L. T., 521).

[4] 45 & 46 Vict., c. 38, sec. 38.

[5] *Re Spencer's Settlement* (1903), 1 Ch., 75; 72 L. J., Ch., 59; 88 L. T., 158; *Re Coull* (1905), 1 Ch., 712; 74 L. J., Ch., 378. But see *Re Spearman* (1906), 2 Ch., 502; 75 L. J., Ch., 829; *Re Moore* (1906), 1 Ch., 789; *Re Child* (1907), 2 Ch., 348; 76 L. J., Ch., 565.

money rent-charge for B, with remainder to his eldest son in tail subject to a jointure rent-charge for B and a term to secure portions for his younger children. When the eldest son is 21, A and the son bar the entail and convey (subject to B's two rent-charges and the portion term) to such uses as they shall appoint. Then on the son's marriage, A and the son convey (subject as last stated) to the use of A for life, subject to a rent-charge for the son, and then to the son for life, and then to his eldest son in tail subject to jointure and portions for the son's widow and younger children. Now, A can sell as tenant for life under the settlement[1], the purchase-money being paid to the trustees thereof. Or A can sell as tenant for life under the resettlement[2], but only subject to all interests still existing under the settlement. Or A can sell as tenant for life under the compound settlement formed by the three deeds and free from all their provisions, but here the Court must appoint trustees, as no person has power to do so[3].

All the provisions of the Trustee Act 1893 as to appointment of new trustees and discharge and retirement of trustee, apply to trustees of the settlement for the purposes of the Settled Land Acts, whether appointed by the Court or by the settlement or under provisions contained in the settlement[4].

"Tenant for life."

The Act of 1882[5] provides that the "tenant for life" shall mean the person who is, for the time

[1] *Re Wright & Marshall* (1885), 28 Ch. D., 93; *Re Mundy & Roper* (1899), 1 Ch., 275, 296, 297.

[2] *Re Ducane & Nettlefold* (1898), 2 Ch., 96; *Re Mundy & Roper*, supra.

[3] *Re Spencer's Settlement* (1903), 1 Ch., 75; 72 L. J., Ch., 59; 88 L. T., 158; *Re Coull* (1905), 1 Ch., 712; 74 L. J., Ch., 378. But see *Re Spearman* (1906), 2 Ch., 502; 75 L. J., Ch., 829; *Re Moore* (1906), 1 Ch., 789; *Re Child* (1907), 2 Ch., 348; 76 L. J., Ch., 565.

[4] 56 & 57 Vict., c. 53, sec. 47. See ante, p. 58-61.

[5] 45 & 46 Vict., c. 38, sec. 2 (5, 6, 7).

being, under a settlement beneficially entitled to the possession of settled land for his life[1]; and that where there are two or more persons so entitled as tenants in common or joint tenants, they shall together constitute the "tenant for life." All must concur to exercise the statutory powers, as the Act does not enable a majority of such tenants in common or joint tenants to bind the minority; but the consent of one only is sufficient for the exercise of any power conferred by the settlement[2]. If an undivided share of land is settled, the tenant for life can exercise all the Settled Land Act powers in respect of that share without the consent of the owners of the other share[3].

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In noticing the above definition of "a tenant for life" within the meaning of the Act, it must be borne in mind that it is also expressly provided[4] that the following persons, when in possession, shall have the powers of a tenant for life as defined in the Act, viz.: a tenant in tail; a tenant in fee simple with an executory limitation over; the owner of a base fee; a tenant for years determinable on a life not holding merely under a lease at a rent; a tenant for the life of another not holding merely under a lease at a rent; a tenant for his own or any other life or for years determinable on life, whose estate is liable to cease on a given event during that life; a tenant by curtesy (not dower); and a person entitled to the income of land under a direction for payment to him during any life, or until sale of the land or forfeiture of his interest therein on bankruptcy or other event.

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[1] Possession includes receipt of income, 45 & 46 Vict., c. 38, sec. 2 (10 i), so an equitable tenant for life in possession has the statutory powers. See hereon, *Re Richardson* (1900), 2 Ch., 778; 69 L. J., Ch., 804.

[2] 45 & 46 Vict., c. 38, sec. 56; 47 & 48 Vict., c. 18, sec. 6.

[3] *Cooper* v. *Belsey* (1899), 1 Ch., 639; 68 L. J., Ch., 258; 89 L. T., 69; 47 W. R., 443.

[4] Settled Land Act 1882, sec. 58.

General provisions.

The idea of the Act in conferring the powers that it does upon a tenant for life is not to take away or prejudice any other powers that may be conferred upon him. But it is provided that in case of conflict between the provisions of the settlement and of the Act, the provisions of the Act shall prevail; and that, notwithstanding anything in the settlement, the consent of the tenant for life shall be necessary to the exercise by the trustees of the settlement, or other person, of any power conferred by the settlement exerciseable for any purpose conferred by the Act[1]. It has been provided that if several persons together constitute a tenant for life, then the consent of one only of such persons is to be necessary[2]. But where a testator gives a power of sale to trustees and directs them to hold the realty and its proceeds in equal fifth parts, one part for each of his five daughters for life and then for her children, the trustees cannot make a good title under their power without the consent of the five daughters, as they are not together tenants in common for life of the realty, but each is a tenant for life of an undivided settled share of it[3]. It is expressly enacted that any prohibition or limitation against the exercise of the powers conferred by the Act is void[4], and this is so even though the prohibition is made in an indirect manner[5]. It is also provided that a tenant for life shall, in exercising his powers under the Act, have regard to the interests of all parties entitled, towards whom he is to be deemed to be in the position of, and to have the duties and liabilities of, a trustee[6].

Re Osborne & Bright.

Re Ames.

[1] Settled Land Act 1882, secs. 56, 57.
[2] Settled Land Act 1884 (47 & 48 Vict., c. 18), sec. 6 (2).
[3] *Re Osborne & Bright* (1902), 1 Ch., 335; 71 L. J., Ch., 285; 86 L. T., 178.
[4] Settled Land Act 1882, sec. 51.
[5] *Re Ames* (1893), 2 Ch., 479; 62 L. J., Ch., 685; 68 L. T., 787; *Re Trenchard* (1902), 1 Ch., 378; 71 L. J., Ch., 178; 86 L. T., 196.
[6] Settled Land Act 1882, sec. 53. See *Chandler* v. *Bradley* (1897), 1 Ch., 315; 66 L. J., Ch., 214; 75 L. T., 581; *Re Hunt* (1906), 2 Ch., 11; 75 L. J., Ch., 496; 94 L. T., 747.

We will now proceed to consider the powers conferred upon a "tenant for life" by the Settled Land Acts 1882-1890, bearing in mind that these powers are also conferred on certain other persons who do not fall within the definition of a "tenant for life" given in the Act of 1882, but who are, nevertheless, all limited owners, and require more or less a similar assistance.

Ante, p. 172.

Power of sale, etc.

The tenant for life has conferred upon him a very full power of selling[1], enfranchising, exchanging, or making partition of the settled estate, or any part thereof. He may sell by public auction or private contract, together or in lots, and has power to fix reserves, and buy in at any auction. Generally he has as full powers as a fee simple owner, subject to this, that whereas a fee simple owner can sell for any price he chooses, the tenant for life must sell at the best price that can be obtained[2]. This, however, is a matter that does not affect a purchaser taking in good faith, who is safe in his purchase, although he, in fact, has not paid full value[3], but the tenant for life would be liable to the other persons interested in the settled estate for the loss[4]. To shew how extensive the powers of a tenant for life are, we may observe that if there is an incumbrance existing on part only of the settled estate, he may on any sale, exchange, or partition, with the consent of the incumbrancer, shift the incumbrance from one part of the property to another[5]. Thus a tenant for life

Shifting an incumbrance.

[1] By the Glebe Lands Act 1888 (51 & 52 Vict., c. 20) the incumbent of a benefice has the powers of a tenant for life to sell glebe land which forms part of the endowment, but he has to get the sanction of the Board of Agriculture after notices to the bishop, patron, parishioners, and sanitary authority.

[2] Settled Land Act 1882, secs. 3, 4.

[3] Sec. 54. See *Hurrell* v. *Littlejohn* (1904), 1 Ch., 689; 73 L. J., Ch. 287; 90 L. T., 260.

[4] Sec. 53.

[5] Sec. 5.

wishes to sell a portion of the settled estate only, and on that particular portion there is a mortgage. It not being desired to pay off the mortgage, if the mortgagee consents, the mortgage may be shifted so as to form an incumbrance on some other portion of the property, and that particular portion on which the mortgage originally subsisted conveyed to the purchaser free from the mortgage. Again, it is provided that the tenant for life may deal with the land apart from the minerals (a thing that trustees cannot do without the consent of the Court[1]), and may also grant and reserve easements[2]. Furthermore, on a sale or lease for building purposes, a tenant for life, for the general benefit of the residents on the settled land, or any part thereof, may appropriate portions thereof for streets, roads, paths, squares, gardens, or other open spaces, and may execute any deed necessary for vesting such portions in any trustees, or any company or public body—such deed must be enrolled in the Central Office[3]. It is clear that the general benefit of the residents is the principal object to be kept in view, but no doubt that benefit must be such as to bring in a sufficient pecuniary compensation to recoup to the settlement the loss of the land so dedicated, and any proposed scheme of this kind must be of a nature usual in similar undertakings[4]. If a sale is to be made to the tenant for life, or a purchase made from him, or an exchange or partition to be made with him, the trustees of the settlement (in addition to their own powers) are to have all the statutory powers of the tenant for life in reference to negotiating and completing the transaction[5].

Selling land apart from minerals.

Appropriation for streets, gardens, etc.

[1] See ante, pp. 67, 68.
[2] Settled Land Act 1882, sec. 17.
[3] Sec. 16.
[4] Hood & Challis, 246.
[5] Settled Land Act 1890, sec. 12.

Leasing.

Very full powers of leasing are also conferred upon a tenant for life, in fact, on the whole, as full powers as an owner in fee simple would ordinarily ever desire to exercise. He may grant a building lease for not exceeding 99 years, a mining lease for not exceeding 60 years, and any other lease for not exceeding 21 years[1]. Every such lease must be *bonâ fide*, *e.g.*, a tenant for life during widowhood cannot lease to the man she is about to marry[2]. Every such lease is to be by deed (except[3] for a term not exceeding three years), to take effect in possession within 12 months from date, at the best rent that can reasonably be obtained, to contain a covenant for payment of rent, and a condition of re-entry on non-payment within a time not exceeding 30 days. A counterpart is to be executed by the lessee and delivered to the tenant for life; but the execution of the lease by the tenant for life is to be sufficient evidence of this[4]. A lessee who acts in good faith need not trouble himself whether he is giving the best rent[5]. Every building lease must be partly in consideration of the erection or improvement or putting into repair of building, and a nominal rent may be reserved for the first five years; and where the land is contracted to be leased in lots, the entire rent may be apportioned among the various lots, provided the rent on each lease is not less than ten shillings, and is not more than one-fifth of the rack rent after the buildings are erected[6]. In a mining lease, the rent may be made

Building leases.

Mining leases.

[1] These powers may be extended by the settlement. Where a tenant for life, or any other person, makes a lease under a power and exceeds the terms of the power, formerly the lease was void; but now by the Leases Acts 1847 and 1849 (12 & 13 Vict., c. 26, and 13 Vict., c. 17), if the lessee has entered, the invalid lease is a contract to grant a lease which will comply with the power, and the remainderman can confirm the invalid lease if he likes.

[2] *Middlemas* v. *Stevens* (1901), Ch., 574; 70 L. J., Ch., 320; 84 L. T., 27.

[3] Settled Land Act 1890, sec. 7 (3).

[4] Settled Land Act 1882, secs. 6, 7.

[5] Sec. 54.

[6] Sec. 8.

ascertainable, or to vary, according to acreage worked, or minerals obtained[1], and according to the price from time to time of the minerals obtained[2], and the lease need not necessarily reserve some rent during the first year[3]. As to both building and mining leases, on proof that it is customary to do so in the district, or that it is difficult to make leases otherwise, the Court may authorize leases for longer terms, or even in perpetuity, on conditions expressed in the order[4]. On the granting of any lease a fine or premium may be taken[5], but such fine is capital money and is not income to be taken by the tenant for life[6]. When a lease is granted it binds all persons interested in the settled estate, and of course the tenant for life takes the rent; but with regard to a mining lease, as a part of the inheritance is being taken away, it would manifestly not be fair that the tenant for life should be allowed to receive the entire rent, and it is, therefore, provided that part of the rent shall be capital money, viz., when the tenant for life is impeachable for waste three-fourths, and when not so impeachable one-fourth thereof[7].

Fines.

Setting aside portion of rent of mining leases.

The Settled Land Act 1882, although giving a tenant for life power to sell and to lease, does not confer upon him any general power of mortgaging—it would not be natural or reasonable that it should. He may, however, mortgage the settled estate, or any part thereof: (1) for the purpose of raising money required for any enfranchisement, or for equality of exchange or partition[8], (2) for the purpose of

Mortgaging.

[1] Settled Land Act 1882, sec. 9.
[2] Settled Land Act 1890, sec. 8.
[3] *Re Aldam's Settlement* (1902), 2 Ch., 46; 71 L. J., Ch., 552; 86 L. T., 510.
[4] Settled Land Act 1882, sec. 10.
[5] Sec. 7 (2).
[6] Settled Land Act 1890, sec. 4.
[7] Settled Land Act 1882, sec. 11.
[8] Sec. 18.

discharging an incumbrance on the settled land[1]—thus if two estates are settled by different instruments at different times but in the same way, and either estate is subject to a mortgage which is called in, a new mortgage over both estates may be given to pay off the called in mortgage on one[2]; (3) for the purpose of raising any costs, charges, or expenses directed by the Court to be paid out of the settled property[3]. As an example of an occasion for a mortgage for the last-mentioned purpose, it may be noticed that the Court has power, if it thinks fit, to approve of any action, defence, petition to Parliament, Parliamentary opposition, or other proceeding taken, or proposed to be taken, for protection of settled land, or of any action or proceedings for recovery thereof, and to direct the costs in connection therewith to be paid out of the settled estate[4].

Protection of settled estate.

Vesting property in purchaser, lessee, etc.

The Settled Land Act 1882, having thus given a tenant for life certain powers, goes on to provide that on any sale, exchange, partition, lease, mortgage, or charge, the tenant for life may convey[5] the land (including copyholds and leaseholds vested in trustees) or create easements, by deed, which shall pass the interest that it purports to pass, and which can properly pass under the Act, freed entirely from all the limitations and provisions of the settlement and all interests thereunder, but except and subject to: (1) estates, interests and charges having priority to the settlement, (2) estates, interests and charges created under the settlement, for securing money already raised, and (3) rights previously granted for value under the settlement. As to copyholds, the

[1] Settled Land Act 1890, sec. 11; *Re Monson* (1898), 1 Ch., 427; 67 L. J., Ch., 176; *Re Clifford* (1902), 1 Ch., 87; *Re Coull* (1905), 1 Ch., 712.

[2] *Re Monson*, supra.

[3] Settled Land Act 1882, sec. 47.

[4] Sec. 36.

[5] For precedents see 1 Prideaux, 338, 341.

deed is rendered sufficient without surrender, and on production of the deed, and of the settlement to shew the title of the tenant for life, to the steward of the manor, he must make the proper entry on the court rolls and give admittance[1]. It has been pointed out that a tenant for life may on selling the settled land reserve the minerals, it being so expressly provided; and it has also been held that on granting a building lease he has power to reserve the minerals[2].

Gladstone v. *Gladstone.*

In the same way that a tenant for life may sell, exchange, partition, mortgage, and lease, so also may he contract therefor, and may revoke such contracts, and enter into fresh ones, as if he were absolute owner, and every contract is enforceable in favour of or against successors[3]. Ordinarily a tenant for life cannot make a lease with an option to the lessee to purchase, but he can do so in the case of a building lease, provided the price is fixed in the lease and the option does not exceed ten years[4]. A tenant for life may grant a lease to carry out a binding contract made by his predecessors in title, or under a binding covenant for renewal, or to confirm a previous one being void or voidable, but so that every lease, as and when confirmed, shall be such as might at the date of the original lease have been lawfully granted[5]. He may also accept a surrender of any lease either as to all or any part of the property[6]. If a manor forms part of the settled estate, the tenant for life may grant licences to copyhold tenants to make any such leases as he might make of freeholds, and such licences may fix the annual value whereon fines and

Contracts to lease, or sell, and other powers.

Option to purchase.

[1] Settled Land Act 1882, sec. 20.
[2] *Gladstone* v. *Gladstone* (1900), 2 Ch., 101; 69 L. J., Ch., 455; 82 L. T., 515.
[3] Settled Land Act 1882, sec. 31.
[4] Settled Land Act 1889 (52 & 53 Vict., c. 36), sec. 2.
[5] Settled Land Act 1882, sec. 12.
[6] Sec. 13.

other customary payments are to be assessed, and must be entered on the court rolls of the manor[1].

Tenants for life under disability.

It may sometimes happen that a tenant for life is a person under some natural disability beyond being only a limited owner. If the tenant for life is a

Married women.

married woman, and is entitled for her separate use, either under the settlement or by statute, then she without her husband has the powers conferred by the Settled Land Acts; but where this is not the case, then she and her husband together have the powers, and probably in this case no acknowledgment by the married woman is necessary[2]. A restraint on anticipation in the settlement does not prevent the exercise by the married woman

Lunatic.

of her powers[2]. If the tenant for life is a lunatic so found by inquisition, the committee of his estate may, by order of the lunacy judge obtained on summons, exercise the powers conferred by the Acts[3]. But if the tenant for life is of unsound mind and is not a lunatic so found by inquisition, the Settled Land Acts did not authorize any exercise of the powers conferred by them; and

Re S. S. B.

it was held that the Lunacy Act 1890 did not empower a quasi-committee to exercise any of them[4] except[5] the powers of exchange and partition and the leasing powers[6], which may be exercised by a person appointed to manage the tenant for life's property by an order obtained under the Lunacy Act 1890[7]. Now, however, the Lunacy

[1] Settled Land Act 1882, sec. 14.
[2] Sec. 61.
[3] Sec. 62.
[4] *Re Baggs* (1894), 2 Ch., 412; 63 L. J., Ch., 612; 71 L. T., 138; *Re S. S. B.* (1906), 1 Ch., 712; 75 L. J., Ch., 522; 94 L. T., 599.
[5] Lunacy Act 1890, secs. 116 and 120 (b) and (h); *Re S. S. B.*, supra.
[6] *Re Salt* (1896), 1 Ch., 117; 65 L. J., Ch., 152; 72 L. T., 598. But all powers expressly conferred by the settlement may be exercised by such person by leave (*Re X* (1894), 2 Ch., 415; 63 L. J., Ch., 613; 71 L. T., 139), though this decision is very doubtful since *Re S.S.B.*, supra.
[7] 53 Vict., c. 5.

Act 1908[1] expressly provides that any power which could be exercised by the committee of the estate of a lunatic so found by inquisition can be exercised in the case of a person of unsound mind, but not found a lunatic by inquisition, by such person as the lunacy judge or master may direct; and having regard to the language of section 62 of the Settled Land Act 1882, it would seem that all the Settled Land Act powers can now be exercised by reason of this Lunacy Act 1908. If the tenant for life is an infant, then the powers conferred by the Settled Land Acts are to be exercised by the trustees of the settlement, and if there are none, then by such person, and in such manner, as the Court, on summons by the guardian or next friend of the infant, orders[2].

Infants.

In connection with this point it is provided that where a person who is in his own right entitled in possession to land is an infant, then for the purposes of the Acts the land is settled land, and the infant is deemed tenant for life thereof[3]. Here, then, we have yet another case of the powers of the Act being extended to persons not strictly "tenants for life," and it is sometimes undoubtedly a convenience. Thus, suppose A, an infant, is a fee simple owner, and it is desired to sell the land. If there are any trustees of the settlement they may sell, as they could in the case of an infant tenant for life, and if there are no such trustees, an order can be obtained appointing persons to sell and convey. An infant cannot himself convey land, except: (1) gavelkind lands by feoffment at the age of 15[4]; and (2) under the provisions of the Infants Settlement Act 1855[5].

Infant tenant in fee simple.

[1] 8 Edw. VII., c. 47, sec. 1.
[2] Settled Land Act 1882, sec. 60.
[3] Sec. 59.
[4] Ante, p. 8.
[5] Post, Chap. XV.

Neither can an infant exercise a power of appointment over real estate, though he may by deed, but not by will, exercise a power of appointment over personal property, if he is of sufficient understanding[1]. If a trustee or mortgagee is an infant, the Court can make a vesting order or can appoint a person to convey under the Trustee Act 1893[2]. Certain powers for managing the property of infants are conferred by the Infants Property Act 1830[3]. Also the Conveyancing Act 1881 contains provisions on this head. For by section 42 where the person beneficially entitled to the possession of any land (either by settlement, descent[4], or otherwise) is an infant (and if a female, unmarried), the trustees of any settlement, or persons appointed by the Court on application, may take possession of such land and generally deal with it in a proper and due course of wide management, and use the income to pay expenses and outgoings and for the benefit of the infant, and accumulate unapplied income for the person ultimately entitled thereto.

Conveyancing Act 1881, sec. 42.

Notice generally necessary to be given by tenant for life.

It was not to be expected that the Settled Land Act 1882, in giving such extensive powers of alienation to a tenant for life, should leave him absolutely unrestricted as regards their exercise. He has not, it is true, generally to obtain any consent to his exercise of the powers, but in all cases certain preliminaries have to be observed. The Act of 1882[5] provides that a tenant for life intending to exercise any of the powers conferred by its provisions shall send by registered post, not less than one month

[1] *Re Cardross* (1878), 7 Ch. D., 728; 48 L. J., Ch., 327; *Re D'Angibau* (1880), 15 Ch. D., 228; 49 L. J., Ch., 756; 43 L. T., 135.

[2] 56 & 57 Vict., c. 53, secs. 26, 28, 33.

[3] 11 Geo. IV. and 1 Wm. IV., c. 65.

[4] *Re Glover* (1899), Ir. R., 377; *Re Cowley* (1901), 1 Ch., 38; 83 L. T., 729.

[5] Sec. 45.

before he acts, a notice thereof to each trustee at his usual place of abode, and if he knows the trustees' solicitor, to such solicitor at his usual place of business. We see, therefore, that for the exercise of the powers conferred upon a tenant for life there must be trustees of the settlement, and at the time of the notice there must not be less than two such trustees, unless the settlement provides otherwise[1]. Still, a person dealing in good faith with the tenant for life is not concerned to enquire whether such notice has been given[1]. There is one case in which such notice need not be given, and that is[2] where the tenant for life is making a lease for not more than 21 years, provided it is at the best rent that can reasonably be obtained without fine, and under which the lessee is not permitted to commit waste. Such a lease as this can be made even if there are no trustees of the settlement[2]. Generally, therefore, for the exercise of the powers, it is absolutely necessary that there should be two trustees of the settlement, and that notice should be given. It was formerly held that the notice must specify particulars of the intended dealing with the settled estate[3]; but it is now provided that a general notice shall be sufficient as to sale, exchange, partition and lease, but that the tenant for life is, upon request by a trustee of the settlement, to furnish him with such particulars and information as may reasonably be required from time to time of intended dealings with the land[4]. It is also provided that trustees may waive the notice, or may accept less than a month's notice[4]. The object of the notice is to enable the trustees to see what is being done, and to go to the Court and stop any improper dealing, by obtaining an injunction.

Exception.

General notice sufficient.

[1] Settled Land Act 1882, sec. 45.
[2] Settled Land Act 1890, sec. 7.
[3] *Re Ray's Settled Estates* (1884), 25 Ch. D., 464; 53 L. J., Ch., 205; 50 L. T., 80.
[4] Settled Land Act 1884, sec. 5.

Whether notice has been given or not does not affect a purchaser or lessee from the tenant for life, if he does not, in fact, know that no such notice has been given[1]; and though he knows that no notice was given prior to the contract, that is of no consequence, as long as there has been a sufficient notice preceding the conveyance or lease[2].

Principal mansion-house, etc.

No consent then, but only a notice is, as a general rule, necessary for a tenant for life to exercise the powers conferred by the Settled Land Acts. But there is one case in which the tenant for life cannot exercise his statutory powers without either the consent of the trustees, or an order of the Court, and that is if he proposes to sell or lease the principal mansion-house and the pleasure grounds and park or lands occupied therewith, unless indeed the house is usually occupied as a farmhouse, or the site of the house and pleasure grounds and park or lands occupied therewith, do not together exceed 25 acres in extent[3]. There is also one case in which the tenant for life cannot sell without the consent of the Court, and that is where the settled property consists of personal chattels settled so as to devolve with land until a tenant in tail by purchase is born, or attains 21, or so as to otherwise vest in some person becoming entitled to an estate of freehold of inheritance in the land[4]. When personal chattels are thus settled they are commonly styled heirlooms, but they are not, in any true or correct sense, heirlooms at Common Law. An heirloom at Common Law is a personal chattel which by special

Heirlooms.

[1] *Hatten* v. *Russell* (1888), 38 Ch. D., 334; 57 L. J., Ch., 425; 58 L. T., 271.

[2] *Duke of Marlborough* v. *Sartoris* (1886), 32 Ch. D., 616; 56 L. J., Ch., 70; 55 L. T., 506.

[3] Settled Land Act 1890, sec. 10.

[4] Settled Land Act 1882, sec. 37. As to this mode of settling personal chattels, see Chap. XV.

custom goes with the land, or with a freehold office, *e.g.*, the Crown jewels. Probably beyond this example no heirloom, properly so called, exists now, unless we style the title deeds of freehold property heirlooms, which is, perhaps, not strictly correct.

Capital moneys.

These then are the only restrictions on the exercise by a tenant for life of the powers conferred by the Settled Land Acts. But as regards any purchase-moneys, fines, premiums on leases, or proportion of rent which he is prohibited from taking as income, it must not be thought that he has any right to receive the same. Such moneys constitute "capital moneys" and must be paid to the trustees of the settlement, or into Court, at the option of the tenant for life[1]. They have then to be invested according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, in any of the various investments which are prescribed, and the capital money and the investments thereof are to be considered as land and to be held for, and go to, the same persons successively, in the same manner exactly as if the powers of the tenant for life had never been exercised[1]. Any capital money may be applied or invested in any of the following ways: in investment on Government or other securities on which trustees may invest either by law[2] or under the settlement; in debenture stock of any railway company in Great Britain or Ireland, which has for the ten preceding years paid a dividend on its ordinary stock; in discharge of incumbrances, land tax, etc., on the settled land; in payment for any improvement authorized by the Acts; in payment for equality of exchange or partition; in purchase of the seignory, reversion, or freehold in fee of any part of the settled land; in

Investments.

[1] Settled Land Act 1882, sec. 22.
[2] Ante, p. 63.

purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for at least 60 years unexpired[1] or of mines and minerals, or easements convenient to be held with the settled land; in payment to any person becoming absolutely entitled; in payment of any costs and expenses, in connection with any of the powers under the Acts; and in any other mode in which money produced by the exercise of a power of sale in a settlement is applicable thereunder[2]. As regards one of the foregoing modes of dealing with capital moneys, viz., in payment for improvements, that is a matter which has been already dealt with[3].

Conflict between tenant for life and trustees.

It is evident that in some cases there may be a conflict between the tenant for life and the trustees; the tenant for life may have a power to do a certain thing, but the consent of the trustees may be necessary, *e.g.*, in the case of dealing with the principal mansion-house, or in applying money for improvements. In all such cases, either party may apply to the Court for directions respecting the matter in difference[4].

2. Alienation by will.

Land.

The power to alienate by will was of later origin than the power to alienate by act *inter vivos*. Dealing firstly with land we find there was no testamentary right of alienation recognized by the feudal system. A practice, however, grew up when uses were established[5], for a person to convey his lands to some one in whom he had confidence, to hold at his death to such uses as he should indicate

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[1] But capital money arising from settled land in England cannot be applied in the purchase of land out of England unless the settlement expressly authorizes the same (sec. 23).

[2] Settled Land Act 1882, sec. 21.

[3] Ante, pp. 16-19.

[4] Settled Land Act 1882, sec. 44.

[5] Ante, p. 49.

by a testamentary disposition. This, no doubt, satisfied most persons' requirements, but when the Statute of Uses was passed[1] and the use was converted into the legal estate or ownership, that naturally put an end to this incidental method of making a will of lands. Five years later the first Statute of Wills[2] was passed, and this permitted a person to devise two-thirds of his knight service lands, and the whole of his socage lands, by an instrument in writing which did not require attestation. When 12 Car. II., c. 24, practically converted all freehold lands into socage[3], it followed that there was a complete right of alienation by will. The Statute of Frauds[4], however, required a will of land to be signed and to be subscribed by three credible witnesses; and thus the law stood until the Wills Act 1837[5], under which a will must now be made in writing signed by the testator in the presence of two or more witnesses present at the same time. The details as regards the making of a will at the present day will be hereafter dealt with[6], but it may even here be noticed that, besides the mere difference in the mode of making a will under the old law, before the Act of 1837, a will could only operate to pass land which the testator was possessed of at the time of making it, whereas now it may operate to pass land to which he is entitled at the time of his death—in other words, before 1838 a will of land only spoke from the date of its making, whilst now it speaks from the date of the testator's death. As regards a will of copyholds, the power to dispose of them by will in a direct way was not recognized until the beginning of the nineteenth century, it being necessary to first

32 Hy. VIII., c. 1.

12 Car. II., c. 24.

Statute of Frauds.

Wills Act 1837.

Copyholds.

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[1] Ante, p. 49.
[2] 32 Hy. VIII., c. 1.
[3] Ante, p. 8.
[4] 29 Car. II., c. 3, sec. 5.
[5] 7 Wm. IV. and 1 Vict., c. 26.
[6] Chap. XVI.

surrender them to the lord for the purposes of the will. This necessity of a prior surrender was abolished before the Wills Act 1837[1], and, of course, nothing of the kind is necessary now under that Act, but a devisee must, after the testator's death, be duly admitted. Leaseholds, being regarded as personalty, could be disposed of by will in a direct manner at a comparatively early time, and now all lands may be completely thus dealt with.

Personalty.

Dealing with the power to dispose of personal property by will, we find that in early times it seems to have been a matter of very gradual and imperceptible growth. It is perhaps impossible to say with any degree of certainty when the binding character of a will of personalty was first recognized. But we find from the statement of Glanville, a writer in the time of Henry II., that a man's goods were to be divided into three equal parts, of which one went to his lineal descendants, another to his wife, and a third could be disposed of by his will; and if he died without a wife he might then have disposed of one half, and the other moiety went to his children, and so *è converso*, if he had no children the wife was entitled to one half, and he might bequeath the other; and if he died without wife or issue, the whole was at his disposal[2]. This state of the law became, however, subject to many exceptions by reason of customs which sprang up in particular places, until by mere gradual growth a full power of testamentary disposition seems to have become established, and in anything like modern times the law, as stated by Glanville, was only found still to be existing in York, Wales and London, and as to these places it was necessary to pass statutes to assimilate the law to

[1] By 55 Geo. III., c. 192.
[2] 2 Stephen's Commentaries, 270.

that prevailing generally[1]. As to the mode of making a will of personalty, there was formerly much difference between that and the mode of making a will of realty. Originally a mere nuncupative will (*i.e.*, one made by word of mouth) was allowed to be valid if it could be proved by witnesses, but by the Statute of Frauds[2] certain restrictions were placed on this position ; it still, however, remained general law that a will of personalty, if in writing, required no witnesses, and would even be good without signature. No such distinction, as a general rule, exists now, wills of realty and of personalty being placed on the same footing by the Wills Act 1837. The whole matter will be found dealt with hereafter in a separate chapter[3].

Nuncupative will.

In connection with modes of alienation generally, it is advisable to explain briefly the proper mode of alienation to a charity. A charity may be, but is not necessarily, a corporation, and, as has been stated, a corporation has generally a power of holding land as well as personal property[4]. There was never any peculiarity as to the disposition of pure personalty to a charity, but as to land there is. Various Acts of Parliament have, from time to time, placed restrictions on the alienation of land to charities, the general policy of the Legislature having been, firstly, to prevent the locking up of land, which becoming the property of some charitable institution was not very likely to be afterwards disposed of, and, secondly, to prevent persons, in their last moments, from being imposed on to give away their land from their families. As regards the last point, it is difficult to perceive why, if it was good reasoning as regards

Charities.

Policy of the Legislature.

[1] See Williams' Personal Property, 436.
[2] 29 Car. II., c. 3, secs. 19-21.
[3] Chap. XVI.
[4] Ante, p. 29.

land, it was not equally so as regards money, and we shall presently see that in quite recent times the Legislature has adopted this view, and has come to the conclusion that there is no good reason to give special protection to relatives, but that it is still advisable to prevent the locking up of land. As regards former Acts of Parliament, there is no occasion to touch upon them further than to state that the Act formerly known as "the Mortmain Act" was 9 Geo. II., c. 36, and that that statute and the various amendments thereof, and generally all former statutes relating to the subject, were repealed by the Mortmain Act 1888[1]. This Act of 1888, together with the Mortmain Act 1891[2], which materially amended it, are the important statutes requiring consideration.

General provisions of Mortmain Act 1888.

Under the Mortmain Act 1888, every assurance of land, or of personal estate to be laid out in the purchase of land, to or for the benefit of a charity, is void unless the various provisions of that Act are observed. These provisions are that any such assurance must be made to take effect for the charity in possession immediately; and must be without power of revocation, or reservation, condition or proviso, subject to this, that it may contain any of the following provisions if the same benefits are reserved to persons claiming under the grantor as to the grantor himself, viz., the reservation of a nominal rent, or of mines, or easements, covenants as to erection, repair, position or description of buildings, and formation or repair of roads, and a right of re-entry on breach of such covenants or provisions. The assurance must (except as regards copyhold land or stock in the public funds) be by deed executed in the presence of two witnesses, and must be executed

[1] 51 & 52 Vict., c. 42.
[2] 54 & 55 Vict., c. 73.

12 months before the death of the grantor, and if it is stock such stock must be transferred six months before death. The provisions with regard to execution 12 months before death, and transfer of stock six months before death, do not, however, apply to assurances for valuable consideration, which may consist of a rent or other annual payment. All assurances (other than of stock in the public funds) must be enrolled in the Central Office of the High Court within six months of execution, though there is power to remedy the omission if it has arisen from ignorance or inadvertence[1].

Exceptions.

There are, however, certain transactions excepted from the above enactment, viz.: (1) Gifts to the Universities of Oxford, Cambridge, London, Durham, and the Victoria University, and the colleges of Eton, Winchester, and Westminster, for the better support of the scholars upon the foundation of such colleges, and for the benefit of Keble College; (2) assurances for valuable consideration, not exceeding two acres, to a trustee for any society for religious purposes, or for the promotion of education, art, literature, or science, for the erection of some building thereon for such purpose, or on which such a building has been erected[2]; (3) assurance for public parks, elementary schools, or public museums[3]. As to these last, it is provided that the disposition may be by will, or by voluntary deed, must be executed 12 months before death and be enrolled with the Charity Commissioners within six months of execution in case of a deed, or within six months of the testator's death in the case of a will, and dispositions *by will* are limited to 20 acres for a park, two acres for a museum, and one acre for a school house. A will,

Public parks, etc.

[1] 51 & 52 Vict., c. 42, secs. 4, 5.
[2] Sec. 7.
[3] Sec. 6.

though not executed 12 months before the testator's death, is good if it be a reproduction in substance of a previous will in force at the time of such reproduction, and which was executed 12 months before death[1].

Working Classes Dwellings Act 1890.

It has also been provided by the Working Classes Dwellings Act 1890[2] that the foregoing provisions of the Mortmain Act 1888 are not to apply to assurances by deed, or will, of land, or personal estate to be laid out in land, for the purpose of providing dwellings for the working classes in any "populous place" (as defined by the Act), but any deed must within six months of execution, and any will within six months of probate, be enrolled with the Charity Commissioners, and a disposition by will must not exceed five acres.

Effect of Mortmain Act 1888.

The effect of the Mortmain Act 1888 was, therefore, subject to the particular exceptions mentioned, to render it impossible to give land, or money to be laid out in land, by will to a charity; and the very wide construction was placed on its provisions that if money in any way savouring of land, or to be applied directly or indirectly in connection with land, was given by will, such gift would be void. This, in fact, was a principle well established long before 1888, under similar provisions in the former Mortmain Act. Thus in *Corbyn* v. *French*[3] a testator bequeathed money to trustees of a chapel to be applied by them towards the discharge of a mortgage on the chapel, and the legacy was held to be void. We have, therefore, the distinction that whilst a testator could by his will give pure personalty, to any extent, to a charity, yet he was generally unable to thus dispose

Corbyn v. *French*.

[1] 51 & 52 Vict., c. 42, sec. 6.
[2] 53 & 54 Vict., c. 16.
[3] (1799) Tudor's Conveyancing Cases, 639.

of his lands, or to give any legacy to be paid out of land, or in any way to be applied in connection with land. This did not appear to be a reasonable distinction.

Mortmain Act 1891.

The Mortmain Act 1891[1] has now made a great change in the law. It applies to the wills of all testators dying after 5th August, 1891, and it provides that land may be given by will to any charitable use or purpose, subject to this, that such land must be sold within one year from the testator's death, or such further time as the High Court, or a judge at chambers, or the Charity Commissioners, allow; and that if the sale is not completed within the time allowed, the land is to vest forthwith in the official trustee of charity lands, and the Charity Commissioners must enforce the sale thereof[2]. Further, if personal estate is directed by will to be laid out in the purchase of land to or for the benefit of a charity, it is not to be thus laid out, but the charity is to receive the money[3]. We see in these provisions a recognition of the idea that there should be no difference between land or money as regards a testator's desires, but that nevertheless it is not desirable that land should be locked up, and remain, probably, where there would be no alienation. In certain cases, however, it is recognized that it is only reasonable to permit a charity to keep the land as desired by the testator, and accordingly it is enacted that when it is necessary for actual occupation for the purposes of the charity, the High Court, or a judge at chambers, or the Charity Commissioners, may sanction the retention of land devised to a charity, or the purchase of land with money directed by a will to be laid out in land[4].

[1] 54 & 55 Vict., c. 73.
[2] Secs. 5, 6.
[3] Sec. 7.
[4] Sec. 8.

General statement as to the Acts of 1888 and 1891.

The law, therefore, may now be stated, generally, to be, that when it is desired to give land to a charity in such a way that it undoubtedly may be held by the charity, the formalities of the Mortmain Act 1888 must still be observed, but that, notwithstanding this, the substantial benefit of land may be given by will—the land will have to be sold, but that is all. There is nothing now to prevent a charitable legacy being charged upon, or made payable out of, land, or being given for such a purpose as was formerly, in *Corbyn* v. *French*, held to be void.

CHAPTER VII.

OF RIGHTS AND INTERESTS IN PROPERTY ACQUIRED OTHERWISE THAN BY DIRECT ALIENATION OR DEVOLUTION ON DEATH.

In the last chapter we have been considering the right of voluntary alienation generally, whether by instrument *inter vivos*, or by will. We have now to consider rights and interests that may be acquired irrespective of any voluntary act, and as in the next chapter we shall particularly consider devolution by the act of the law on a person's death, that matter is excluded from the present chapter, in which three main topics will be dealt with, viz.: (1) Rights of creditors; (2) Rights obtained by the law of limitation of actions; (3) Rights obtained by a husband in his wife's property on marriage. We shall see here, to a certain extent, alienation by operation of law, but certainly no act of voluntary alienation.

1. Rights of creditors.

We have seen that a person possessed of either real or personal property has now a full right to alienate his own estate or interest therein, and sometimes far more than that. The fact that he has creditors does not in itself in any way interfere with his right of alienation, for the ordinary creditor has no lien or charge on his debtor's property, though he may, by proceeding in a proper manner, obtain something of that nature, and ultimately compel payment of his debt out of such property. A creditor, either by specialty or simple contract, if he wishes to acquire a direct right

As to chattels.

over his debtor's property must first sue his debtor, and obtain a judgment of the Court for the amount of his debt. Then as regards the debtor's chattels in possession he may seize them in execution by means of a *fieri facias*[1], and get them sold by the sheriff. By his judgment, however, he obtains no direct interest in the goods, and a person buying from the debtor, even after the creditor's judgment, gains a perfect title to such goods unless they are already actually seized in execution, or the buyer takes with notice that the writ of execution is lying unexecuted in the hands of the sheriff[2]. So also an outstanding debt due to the debtor may be seized by a judgment creditor by means of a garnishee order[3], and stock or shares by means of a charging order[4]. These matters cannot, however, be said to appertain to the subject of conveyancing, and, therefore, demand no attention here. What we have to deal with is the subject of a creditor's rights over the lands of his judgment debtor, for that is direct conveyancing matter, it being important to consider how, and to what extent, a creditor can obtain an estate, interest, lien, or charge thereon, quite apart from any voluntary act of the debtor who owns the land, and probably very much against his will. This is naturally a matter of essential importance to purchasers and mortgagees of land, who may possibly find their titles defeated by reason of the involuntary alienation effected by the act of the creditor, and it is necessary to briefly look at the history of the law with regard to it.

History as to judgments binding land.

The first statute which enabled a judgment creditor to obtain an interest in his debtor's land was

[1] Indermaur's Practice, 198, 199.
[2] 56 & 57 Vict., c. 71, sec. 26.
[3] Indermaur's Practice, 206-209.
[4] Ibid., 210.

13 Edw. I., c. 18, which enabled such creditor to take one-half of his debtor's land in execution under a writ of elegit[1]. This Act was construed as making the judgment debt a charge on half of the lands that a debtor was possessed of at the time it was obtained, so that if after the judgment the debtor sold his lands the creditor could still take a half out of the hands of the purchaser. Thus a judgment debt became an incumbrance on land, and a matter affecting the title. 13 Edw. I., c. 18.

The Statute of Frauds[2] extended this principle to the estate or interest of a *cestui que trust* of freeholds, provided they were vested in a trustee in fee simple and he was duly seised of them. 29 Car. II., c. 3.

The principle was still further extended by the Judgments Act 1838[3], by which a judgment was made a charge upon all the lands of a judgment debtor of whatever nature, but, as a safeguard to purchasers and others, it was provided that no judgment should affect the lands in the hands of a "purchaser" until registered in the name of a debtor. Here then we find a protection to a purchaser, who was enabled to search for the purpose of ascertaining whether there had been any involuntary alienation of this kind. This protection was extended by the Judgments Act 1839[4], which provided that all judgments, to bind the debtor's land, must be re-registered every five years; and further still by the Law of Property Act 1860[5], which enacted that no judgment to be entered up after 23rd July, 1860, should affect any lands, unless a writ of execution 1 & 2 Vict., c. 110. 2 & 3 Vict., c. 11. 23 & 24 Vict., c. 38.

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[1] Indermaur's Practice, 201.
[2] 29 Car. II., c. 3, sec. 10.
[3] 1 & 2 Vict., c. 110.
[4] 2 & 3 Vict., c. 11.
[5] 23 & 24 Vict., c. 38.

was issued and registered, and put in force within three calendar months from the time of registration.

27 & 28 Vict., c. 112.

But the matter was not allowed to rest here, for the Judgments Act 1864[1] provided that no judgment to be entered up after the passing thereof should affect any lands until the same should have been actually delivered in execution, by virtue of a writ of elegit or other lawful authority. The "other lawful authority" here referred to means what is styled "equitable execution," and consists of obtaining an order appointing a receiver over a judgment debtor's property, and is a process, ordinarily, only resorted to in the case of a debtor possessed of some equitable estate or interest which is incapable of being seized under a writ of execution in the ordinary manner, *e.g.*, an equity of redemption in land[2].

Under the law, therefore, after 1864, a judgment only formed an incumbrance on a debtor's land if it was seized in execution, but even this was not considered a sufficient protection to a purchaser or mortgagee. In the first place, the purchaser or mortgagee might be unaware of the seizure, but yet would be bound, and, in the second place, if it was "equitable execution" he was quite unable to ascertain whether an order appointing a receiver had been obtained by some judgment creditor. If he purchased innocently he would, nevertheless, be postponed to a judgment creditor who had obtained such an order[3]. Another statute was therefore passed, viz., The Lands Charges Registration and Searches Act 1888[4], which provides that no elegit, or order appointing a receiver by way of equitable execution, shall bind

Re Pope.

Lands Charges Act 1888.

[1] 27 & 28 Vict., c. 112.
[2] Indermaur's Practice, 202-206.
[3] *Re Pope* (1886), 17 Q. B. D., 743; 55 L. J., Q. B., 522; 55 L. T., 369.
[4] 51 & 52 Vict., c. 51.

lands of a judgment debtor unless and until it has been duly registered at the Land Registry Office; and shall require to be re-registered every five years. Here then we find at last that, though a creditor by means of judgment and execution can obtain a charge on his debtor's lands, yet a purchaser is sufficiently protected with regard to the matter. By the Lands Charges Act 1900[1], the provision of the Judgments Act 1864 above set out is repealed, and the old registers of judgments and crown debts and executions formerly kept at the Central Office are closed for registration, and registrations therein are retrospectively made void. Consequently it is only necessary, after 1st July, 1901, before completing a purchase, or a mortgage of lands, to search for five years last past at the Land Registry Office[2] for writs of execution and orders appointing receivers by way of equitable execution. When the judgment debt is satisfied, a judge's order may be obtained to vacate the registration[3]; which then ceases to be a blot on the title.

Searches.

If a creditor, having obtained a judgment against a debtor, proceeds to issue a writ of elegit, and to seize his judgment debtor's land thereunder, which he does through the instrumentality of the sheriff, he is then styled a tenant by elegit, and he may hold the land until his judgment debt is satisfied out of the rents and profits, his estate or interest in the meantime being of the nature of a chattel real, and passing on his death to his personal representatives. If he has obtained an order appointing a receiver, there is no capability of taking possession of anything, but if and when anything falls in, to which the order applies, then it is taken by the

Tenant by elegit.

[1] 63 & 64 Vict., c. 26.
[2] Since 1st September, 1900. See note on p. 385.
[3] 53 & 54 Vict., c. 69, sec. 19.

Sale by execution creditor.

receiver, and the judgment creditor gets payment through him. But the judgment creditor who has adopted either of these courses may do something else, for instead of waiting quietly the course of events, he may, after registering his execution in the Land Registry Office, apply by summons to the Chancery Division of the High Court of Justice for an order for the sale of the judgment debtor's interest[1]. It has, however, been held that this provision only applies to interests in land, so that a judgment creditor who has seized a reversionary interest in personalty, by means of an order appointing a receiver, cannot get an order for sale[2].

Flegg v. *Prentis.*

Legal remainders.

Generally, therefore, all property of a debtor is subject to involuntary alienation by a creditor obtaining a judgment, and proceeding to the appropriate mode of execution. There is, however, no mode of execution by which a legal reversion or remainder in land can be made available to a judgment creditor[3], and a judgment creditor's only course is to proceed to make his debtor a bankrupt, when the reversion or remainder will, in the bankruptcy, form part of his property available for the benefit of his creditors generally.

Estate tail.

If the debtor whose land is seized in execution is a tenant in tail, although formerly the judgment and execution could only affect his life interest (because the entail had not been barred, and there was no power on the part of the judgment creditor to bar it), this has now long been different, the judgment being by statute[4] expressly made binding on the lands of

[1] 27 & 28 Vict., c. 112, sec. 4; 51 & 52 Vict., c. 51, sec. 5 (4).

[2] *Flegg* v. *Prentis* (1892), 2 Ch., 428; 61 L. J., Ch., 705; 67 L. T. 107.

[3] *Re South* (1874), 43 L. J., Ch., 441; *Hood-Barrs* v. *Cathcart* (1895), 2 Ch., 411; 64 L. J., Ch., 461; 72 L. T., 583; *Re Harrison* (1899), 1 Ch., 465; 68 L. J., Ch., 208.

[4] 1 & 2 Vict., c. 110, sec. 13.

the debtor as against both his issue, and those interested in remainder, provided, of course, now, that the execution is registered at the Land Registry Office, as before explained[1].

Lis pendens.

In connection with the subject of judgments binding lands, it is well to notice also the possibility of a pending action interfering with a person's free power of alienation. Suppose B obtains from A by fraud a conveyance of A's land, so that it is apparently legally vested in him. A commences an action against B to set the conveyance aside on the ground of B's fraud. B then, pending the action, sells and conveys the land to C. C would formerly have been in the unfortunate position of having no title to the land he had thus purchased, should A succeed in his action. For the protection, therefore, of purchasers and others, it is now provided that no *lis pendens* shall affect them unless it is registered at the Land Registry Office, and, should the action be still pending, re-registration is necessary at the end of five years, and so on continuously every five years[2]. It is, therefore, strictly proper to search whether there is any *lis pendens* affecting the property before completing a purchase or mortgage.

Crown debts.

Beyond the rights that may be obtained by private individuals in a debtor's lands, by judgment and execution, it must also be noticed that the Crown, as a creditor, has certain special rights, which at Common Law consisted of an absolutely prior claim to payment in respect of debts of record, and which was extended by various statutes to specialties and many other claims. There was here special hardship in the fact that the rights of the Crown related back to the time when the liability in respect of which the

[1] Ante, p. 199.
[2] 2 & 3 Vict., c. 11, sec. 7; 63 & 64 Vict., c. 26.

claim was made was originally incurred; but after various statutes, passed to mitigate the hardship, it has now been provided that no Crown debts shall bind any *bonâ fide* purchaser or mortgagee, whether with or without notice of the existence of the debt, unless a writ of execution or order to enforce the debt has been issued and registered at the Land Registry Office prior to the execution of the conveyance or mortgage, and payment of the purchase or mortgage money[1].

Bankruptcy.

Yet another way in which a creditor may obtain an interest in the lands, and, indeed, all property of his debtor, is by making him a bankrupt. For this purpose no judgment is necessary, but an act of bankruptcy having been committed by the debtor, a creditor of sufficient amount (£50) may present a petition, and obtain an adjudication. We have here nothing to do with bankruptcy proceedings in general, but must assume the reader's knowledge in that respect, and proceed to notice the effect of the bankruptcy on the debtor's property[2].

Trustee in bankruptcy.

On a person being adjudicated a bankrupt, a special trustee is usually appointed, but until any such appointment the official receiver is trustee, and the whole of the bankrupt's property, both real and personal, vests in him. When a special trustee is appointed, a certificate of his appointment is given, and such certificate is deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly, as may be necessary[3]. The trustee is, in fact, an alienee of the bankrupt's property, and must do all acts to perfect his title that

[1] 28 & 29 Vict., c. 104, sec. 48; 63 & 64 Vict., c. 26.

[2] The student is referred to Ringwood's Principles of Bankruptcy as a concise and suitable work on the subject.

[3] Bankruptcy Act 1883 (46 & 47 Vict., c. 52).

an ordinary alienee must do. Thus, if the bankrupt was the owner of an equitable chose in action, the trustee will be postponed to his assignee without notice of the act of bankruptcy, if the latter gives notice to the debtor or trustee of the fund before the trustee does so[1]. The certificate of appointment of a trustee in bankruptcy should strictly be registered in Middlesex or Yorkshire, if the property is situate in either of those counties; but the order of adjudication, though it vests the property in the official receiver as trustee, does not require so to be registered[2].

Re Calcott & Elvin's Contract.

The title of the trustee to the bankrupt's property does not date merely from the adjudication, but relates back to the act of bankruptcy, subject to this, that a person taking *bonâ fide* for value before a receiving order has been made, and without notice of any act of bankruptcy, is protected. If, therefore, a person having agreed to buy property, before completing his purchase, receives notice that his vendor has committed an act of bankruptcy, he cannot safely proceed, because if he completes, and then the vendor is made a bankrupt, the title of the trustee will supervene. He must, therefore, wait for three months from the commission of the act of bankruptcy. If no bankruptcy ensues, then he may safely complete and pay his purchase money to the vendor, but if bankruptcy ensues then the trustee in bankruptcy will be the proper person to receive the purchase money, and to convey[3]. If, however, it is a case in which time is of the essence of the contract, then the purchaser is not bound thus to wait, but is entitled to repudiate the contract[4]. Specific

Date of trustee's title.

Powell v. *Marshall.*

[1] *Palmer* v. *Locke* (1881), 18 Ch. D., 381; 45 L. T., 229; 51 L. J., Ch., 124.
[2] *Re Calcott & Elvin's Contract* (1898), 2 Ch., 460; 67 L. J., Ch., 553; 78 L. T., 826; 46 W. R., 673.
[3] *Ex parte Rabbidge, Re Tooley* (1878), 8 Ch. D., 367; 26 W. R., 646.
[4] *Powell* v. *Marshall* (1899), 1 Q. B., 710; 68 L. J., Q. B., 477.

performance can always be had against the trustee in bankruptcy of a vendor of land, unless the property sold is leasehold, in which case the trustee can disclaim both the contract and the lease[1].

Life estate.

If a bankrupt was entitled to a life interest in property, then, though his life estate passes to the trustee in the bankruptcy, such trustee has not the powers of a tenant for life under the Settled Land Acts, because he is an assignee of the life estate, and therefore the powers remain in the bankrupt[2]. In such a case the trustee should—if he desires the settled property, as distinguished from the bankrupt's life estate (with which of course he can deal), to be sold—apply to the bankrupt to exercise the powers conferred by the Act, and if he refuses to do so the trustee should apply to the Court, and the Court will consider what is proposed, and, if it thinks fit, will order the bankrupt to do what is necessary[3]. As

Estate tail.

regards an estate tail possessed by the bankrupt, the trustee has the same power to bar the entail as the

Copyholds.

bankrupt had[4]. As regards any copyhold property, that vests at once in the trustee without any surrender, and the trustee can sell without being admitted, and the lord is bound to admit the purchaser[5]. As regards the whole property of the bankrupt, whether in possession or expectancy, real or personal, or consisting of merely contractual rights, everything passes to the trustee in bankruptcy, subject to a right on his part to disclaim any onerous property; and he may deal with the same to the fullest extent for the purpose of realizing

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[1] *Re Bastable* (1901), 2 K.B., 518; 70 L.J., K.B., 784; 84 L.T., 825; *Pearce* v. *Bastable's Trustee* (1901), 2 Ch., 122; 70 L. J., Ch., 446; 84 L. T., 525.

[2] Settled Land Act 1882, sec. 52, and see ante, p. 169.

[3] *Re Mansel's Settled Estates*, W. N., 1884, 209.

[4] 46 & 47 Vict., c. 52 (Bankruptcy Act 1883), sec. 56 (5).

[5] Ibid., sec. 50 (4).

it for the benefit of the creditors, but he cannot make a mortgage without the sanction of the committee of inspection[1]. If the bankrupt had a power of appointment over property which he might have exercised for his own benefit, the trustee can exercise it for the benefit of his creditors[2], unless the bankrupt is a married woman, when it is otherwise[3], the reason being that she can only, under the Married Women's Property Act 1882, be made bankrupt in respect of her separate property, and a power of appointment is not strictly property at all.

Power of appointment.

Not only has the trustee in bankruptcy a right to all property which the bankrupt was possessed of or entitled to at the date of his bankruptcy, but he has a further right as regards property that may be acquired by the bankrupt before he has obtained his discharge, though in certain cases to complete his title some active interference on his part is necessary. As regards personal chattels acquired by the bankrupt during his bankruptcy, and before his discharge, the trustee must intervene to claim them to complete his title, and if he does not do so, the bankrupt can make a good title to them to a person dealing with him *bonâ fide* for value, whether with or without knowledge of the bankruptcy[4], and this is also so with regard to leaseholds[5]. With regard to freeholds and copyholds, however, this is not the case, it having been held that an undischarged bankrupt cannot, even before the intervention of the trustee in bankruptcy, convey such property acquired

Property acquired by bankrupt before discharge.

Cohen v. *Mitchell.*

Re Clayton & Barclay.

Re New Land Development Association.

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[1] 46 & 47 Vict., c. 52 (Bankruptcy Act 1883), sec. 57.

[2] Ibid., sec. 44.

[3] *Re Armstrong, Ex parte Gilchrist* (1886), 17 Q. B. D., 521; 55 L. J., Q. B., 578; 55 L. T., 538.

[4] *Cohen* v. *Mitchell* (1890), 25 Q. B. D., 262; 59 L. J., Q. B., 409; 63 L. T., 206.

[5] *Re Clayton & Barclay's Contract* (1895), 2 Ch., 212; 64 L. J., Ch., 615; 72 L. T., 764.

during his bankruptcy so as to give a good title as against the trustee[1].

Importance of searching for bankruptcies.

The effect of bankruptcy, therefore, on the subject of conveyancing is important, for it produces an involuntary alienation, transferring, as it does, the ownership to the trustee in bankruptcy; and a purchaser or mortgagee may find himself without a title, either because the property belonged to the vendor or mortgagor at the time of his bankruptcy, or because, though that was not the case, it was acquired by him before he had got his discharge. A search for bankruptcies should, therefore, usually be made before completing a purchase or mortgage, and it may, in fact, be said to be the most important of all searches.

Rights of creditors after death of debtor.

Having considered the rights of a creditor in respect of his debtor's property during the lifetime of the debtor, it remains now to glance at his rights after the debtor's death. We need not trouble ourselves with the subject of personal property, as that has always been assets available for payment of debts.

Fee simple land.

As to a debtor's fee simple land, that was originally only liable for his debts when it was left to descend, and then only for debts of record and specialties in which the heir was bound. No such liability attached to land in the possession of a devisee until the Statute of Fraudulent Devises[2] was passed, which provided that where a deceased person had devised any real estate without making it subject to his debts, the lands devised should be liable for debts just like lands descended. Still no remedy existed

[1] *Re New Land Development Association* (1892), 2 Ch., 138; 61 L. J., Ch., 323; 66 L. T., 404; *London & County Contracts* v. *Tallack* (1903), 51 W. R., 408.

[2] 3 Wm. & M., c. 14, re-enacted by 11 Geo. IV. and 1 Wm. IV., c. 47.

for simple contract creditors against the real estate of a deceased person, until the Administration of Estates Act 1833 made real estate assets to be administered in equity for payment of all debts, a priority being, however, given to creditors by specialty in which the heirs were bound[1], a priority which was subsequently abolished[2]. As to a debtor's fee tail land, creditors have no claim on his death against that in the hands of the heir or remainderman, unless during the debtor's lifetime it has been seized in execution as already explained[3]. A creditor, therefore, having rights in respect of his debtor's property on his death, may take proceedings to enforce such rights, and thus paralyse the powers of alienation that would otherwise be possessed by the deceased's representatives, and such action may, for the sake of security, be registered as a *lis pendens*.

Fee tail land.

2. Rights by the Law of Limitation of Actions.

It is not necessary to here consider the general periods for limitation of actions, for as regards the Statutes of Limitation relating to merely personal claims, they only bar the remedy and not the right, whilst the statutes as regards land actually bar the right[4]; *i.e.*, in the former case there is still technically an existent right, though the remedy by action is suspended or incapable of being applied, whilst in the latter case the right is actually taken away. The scope of the present work permits us here only to deal, or at any rate mainly, with rights as regards land, though some other points may be incidentally referred to[5].

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[1] 3 & 4 Wm. IV., c. 104.

[2] 32 & 33 Vict., c. 46; *Re Samson, Robins* v. *Alexander* (1906), 2 Ch., 584; 76 L. J., Ch., 21; 95 L. T., 633.

[3] Ante, p. 200.

[4] *Sands to Thompson* (1883), 22 Ch. D., 614; 52 L. J., Ch., 406; 48 L. T., 210.

[5] As to limitation of actions generally, see Indermaur's Common Law, 277-284.

If A is entitled to land, but B without any right obtains possession, after a certain time A will lose all right in the land, and B will become really the owner. Thus B acquires an estate or interest in the land without there ever having been any alienation on the part of A, and it is a result brought about by the Statutes of Limitation, the principle of all such statutes being to discourage stale claims. The Act mainly governing the whole matter with which we have here principally to deal, is the Real Property Limitation Act 1874[1], though there are other statutes still in force affecting the subject to some extent[2], and in particular the Real Property Limitation Act 1833[3], which has to be read together with that of 1874.

Real Property Limitation Act 1874.

The Act of 1874 starts by providing that no action shall be brought to recover any land or rent but within 12 years after the time when the right first accrued[4]. This provision must, however, be read in conjunction with one contained in the Act of 1833, to the effect that where an acknowledgment of title is given to the person entitled or his agent, in writing, signed by the person in possession of the land or receipt of the rent, then an action may be brought within the same period from such acknowledgment[5]. It is also provided by the Act of 1874, that in the case of disability existing at the date when the right accrues, there shall be a further period of six years allowed after the disability ceases[6], but so that the extreme period including all disabilities

[1] 37 & 38 Vict., c. 57. It came into operation on 1st January, 1879.
[2] 3 & 4 Wm. IV., c. 27; 3 & 4 Wm. IV., c. 42; 7 Wm. IV. and 1 Vict., c. 28.
[3] 3 & 4 Wm. IV., c. 27.
[4] 37 & 38 Vict., c. 57, sec. 1. The word rent includes a tithe rent-charge (*Irish Land Commission* v. *Grant* (1885), 10 App. Ca., 14). See also post, pp. 218, 219.
[5] 3 & 4 Wm. IV., c. 27, sec. 14. The acknowledgment must be signed by the person in possession, and not by an agent (*Fursden* v. *Clogg* (1842), 10 M. & W., 572).
[6] 37 & 38 Vict., c. 57, sec. 3.

shall be 30 years[1]. It is expressly provided that the time for bringing an action shall not be enlarged by the absence beyond seas of the person having the right to sue[2]. With regard to future estates (*e.g.*, remainderman after life estate), it is provided that the right of action in respect of an estate *in futuro* shall be deemed to have first accrued at the time when it becomes an estate in possession—subject to this, that if the person last entitled to any particular estate on which any future estate was expectant was not in possession at the time his interest determined, an action may be brought by the owner of the future estate within 12 years next after the time when the right first accrued to the owner of the particular estate, or within six years next after the time when the future estate fell into possession, whichever of those two periods shall be the longer[3]. Thus X devises land to A for life, and then to B in fee simple; A goes into possession, and, on his death, C wrongfully seizes the estate. Here B has 12 years from A's death to sue C to recover the land. But suppose when X died A never took possession, but C at once wrongfully entered, and then A died. Here B must sue either within 12 years from the death of X, or six years from the death of A, whichever period is the longer, and therefore the most favourable to him. A lessor, however, always has 12 years from the expiration of the lease within which to sue for possession of the demised land, and it makes no difference to this right of the lessor that during a long lease rent has not been paid for 50 years, and some person has acquired a possessory title against the lessee and has then purported to sell and convey to a third party in fee simple[4].

Future estates.

Walter v. *Yalden.*

[1] 37 & 38 Vict., c. 57, sec. 5.
[2] Ibid., sec. 4.
[3] Ibid., sec. 2.
[4] *Walter* v. *Yalden* (1902), 2 K. B., 304; 71 L. J., K. B., 693; 87 L. T., 97.

Tenants in tail.

With regard to the position of a tenant in tail, his issue and remaindermen, the Act of 1833 provides[1] that when the right of a tenant in tail shall have been barred by reason of his not having sued within the prescribed time, not only shall he be barred, but his issue and those interested in remainder; and if the prescribed time has only partially expired when the tenant in tail dies, such issue or remaindermen shall only have the balance of the original time within which to sue. With regard to a tenant in tail who does not completely bar his entail, but only creates a base fee, the Act of 1874 provides[2] that the rights of persons interested in remainder shall be barred when the owner of the base fee has gone into possession, and has held for 12 years after the time when a disentailing assurance by the tenant in tail would have been completely effectual. Thus A is tenant for life, and B tenant in tail in remainder, and B bars his entail without A's consent, and thus creates a base fee. Then A dies, and B goes into possession. Still B has only got a base fee, but after a lapse of 12 years from A's death B's base fee becomes enlarged into a fee simple absolute.

Base fee.

Advowsons.

The Act of 1833 specially deals with advowsons by providing that an action to recover an advowson must be brought within the period covered by three successive adverse incumbencies, or 60 years, whichever is the longer, but under no circumstances after the lapse of a total period of 100 years, and there is here no saving as regards disabilities[3].

Tithes and tithe rent-charges.

Time did not formerly bar a claim to tithes, but as regards the tithe rent-charge which has now taken the place of tithes[4], that is statute barred after

[1] 3 & 4 Wm. IV., c. 27, secs. 21, 22.
[2] 37 & 38 Vict., c. 57, sec. 6.
[3] 3 & 4 Wm. IV., c. 27, secs. 30-33.
[4] Ante, p. 117.

12 years, for it is a rent; unless, indeed, it belongs to a spiritual, or eleemosynary, corporation sole, when it is only statute barred after two incumbencies and six years, or 60 years, whichever is the longer[1]. Only two years' arrears of tithe rent-charge can be recovered[2].

Mortgagee in possession.

With regard to the position of a mortgagee who takes possession, and who as mortgagee is of course liable to be redeemed by the mortgagor, the Act of 1874 provides that the mortgagor shall be absolutely barred after the lapse of 12 years from the date when the mortgagee took possession, or from the last signed acknowledgment given by the mortgagee, or his agent, of the mortgagor's right to redeem[3]. This provision is absolute, and gives no further time although the person entitled to redeem may have been under disability[4]. Thus A mortgages his land to B, and B enters. A then dies, and the equity of redemption passes to A's son, who is only six years of age. This son on attaining 21 desires to redeem, but he cannot do so, for he is statute barred.

Forster v. *Patterson.*

Mortgagee's rights against mortgagor.

The Act of 1874 also deals with the rights of a mortgagee or other owner of a charge or lien on land or rent. It provides that no action shall be brought to recover any sum of money secured by any mortgage, charge, or lien on any land or rent but within 12 years after the right to receive the same has accrued, unless in the meantime some part of the principal money or some interest has been paid, or a signed acknowledgment has been given by the

[1] 3 & 4 Wm. IV., c. 27, sec. 29; 37 & 38 Vict., c. 57, sec. 1; *Irish Land Commissioners* v. *Grant* (1885), 10 App. Ca., 14; 52 L. T., 228; 33 W. R., 357.

[2] 6 & 7 Wm. IV., c. 71, secs. 82, 84; 54 Vict., c. 8, sec. 2.

[3] 37 & 38 Vict., c. 57, sec. 7.

[4] *Forster* v. *Patterson* (1881), 17 Ch. D., 132; 50 L. J., Ch., 603; 44 L. T., 465.

mortgagor or his agent[1]. It was at first thought that perhaps this provision was only meant to bar all claims against the land, and that the right to sue to recover the money owing would still exist for 20 years if the mortgage or charge were under seal, that being the period for suing to recover a specialty debt. The contrary has, however, been decided, and after 12 years the mortgagee of land is barred, not only against the land, but also of his personal remedy to obtain payment of the debt[2]. It indeed seems an anomaly that if A owes B £1000 on a bond, B may sue him within 20 years, but if the debt is secured on land, though equally by a covenant under seal, the action must be brought within 12 years. This anomaly is accentuated when we observe that the provision in the Act of 1874 does not apply to a mortgage of pure personal estate, *e.g.*, a mortgage of a reversionary interest in money, or an insurance policy, or a bill of sale on furniture, as to which the time to sue is still 20 years if the mortgage is under seal[3]. The construction of the provision we are considering is not in fact by any means a matter of simplicity. It has been held that a mortgagee of land must sue within the period of 12 years, even though, apart from the mortgage, there is a collateral bond by the mortgagor[4]; but if there is a collateral bond by a third person[5], or even if such third person joined as surety in the mortgage deed itself[6], then, as

Sutton v. *Sutton.*

Fearnside v. *Flint.*

Re Powers.

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[1] 37 & 38 Vict., c. 57, sec. 8.

[2] *Sutton* v. *Sutton* (1883), 22 Ch. D., 511; 52 L. J., Ch., 333; 48 L. T., 95. And it makes no difference that the mortgaged property is a reversionary estate in realty (*Kirkland* v. *Peatfield* (1903), 1 K. B., 756; 72 L. J., K. B., 355; 88 L. T., 472).

[3] *Mellersh* v. *Brown* (1890), 45 Ch. D., 225; 60 L. J., Ch., 43; 63 L. T., 180.

[4] *Fearnside* v. *Flint* (1883), 22 Ch. D., 579; 52 L. J., Ch., 479; 48 L. T., 154.

[5] *Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D., 291; 53 L. T., 647.

[6] *Re Frisby, Allison* v. *Frisby* (1890), 43 Ch. D., 106; 59 L. J., Ch., 94; 61 L. T., 632, and see in the Court below, 60 L. T., 922.

against such third person, an action on the covenant may be brought within 20 years.

Position of surety.

It will be observed with regard to the matter dealt with in the last paragraph, that if there has been a signed acknowledgment, part payment of principal, or payment of interest, a further period of 12 years is allowed from either of those events. When there is a mortgage of land, and there is a surety for the debt, an acknowledgment, or part payment of principal or payment of interest, made by the mortgagor, will keep the debt alive against the surety as well as against the principal debtor, for although under the provisions of the Acts relating to personal claims[1] a co-debtor is not to lose the benefit of the Statutes of Limitation by reason of acknowledgment, part payment, or payment of interest made by another co-debtor, yet there is no similar provision as regards debts charged on land. Thus, A mortgaged freeholds in 1838, and died in 1871, having devised the mortgaged freeholds to B and his other real estate to C. The interest on the mortgage was paid by B to 1904, when the mortgaged land proved insufficient to discharge the principal, and the mortgagee then brought an action for administration of A's estate in which it was held that the payment of interest by B was a payment by a person who was bound as between himself and the mortgagor to pay and had prevented the Statute of Limitations running against A's estate, and consequently (there being no personal estate) the mortgagee was entitled to be paid out of the realty devised to C[2].

Re Lacy.

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[1] 9 Geo. IV., c. 14, sec. 1; 19 & 20 Vict., c. 97, sec. 14.

[2] *Re Lacy, Howard* v. *Lightfoot* (1907), 1 Ch., 330; 76 L. J., Ch., 316. See also *Bradshaw* v. *Widdrington* (1902), 2 Ch., 430; 71 L. J., Ch., 627; *Roddam* v. *Morley* (1857), 26 L. J., Ch., 438; *Leahy* v. *De Moleyns* (1906), 1 Ir. R., 206.

Where a mortgage of land has been created, and a trespasser has afterwards gone into possession and remained in long enough to acquire a possessory title against the mortgagor and those claiming under him, but the mortgage has been kept alive by the regular payment of interest, the mortgagee has 12 years from the last payment of interest within which to sue for recovery of possession from such trespasser[1].

Second mortgage.

Where a second mortgage is created, the statutory 12 years begins to run against such mortgagee from the date when the principal fell due or the last subsequent payment on account of principal or interest, or signed acknowledgment, and the second mortgagee is not allowed any extension of time by reason of there being a prior mortgage; nor is the running of the statutory 12 years suspended by the prior mortgagee taking possession[2].

Judgments.

The Act of 1874 applies also to judgments, and here again we see an anomaly. If A owes B £100 on a bond, B has 20 years within which to sue A; but if B immediately on the money becoming due sues A and gets judgment, then his time is cut down to 12 years from the date of the judgment, which is extinguished at the end of that period[3]. The

Legacies.

same section also applies to all legacies, whether charged on land or not[4], and here once more is an anomaly, for an action to recover a share of personalty under an intestacy may be brought

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[1] 7 Wm. IV. and 1 Vict., c. 28; 37 & 38 Vict., c. 57, sec. 9; *Ludbrook* v. *Ludbrook* (1901), 2 K. B., 96; 70 L. J., K. B., 552; 84 L. T., 485.

[2] *Johnson* v. *Brock* (1907), 2 Ch., 533; 76 L. J., Ch., 602; 92 L. T., 294.

[3] *Jay* v. *Johnstone* (1893), 1 Q. B., 189; 62 L. J., Q. B., 128; 68 L. T., 129.

[4] *Re Rowe*, *Jacobs* v. *Hind* (1890), 61 L. T., 581.

within 20 years[1]. The right to receive a legacy arises at the end of 12 months from testator's death[2], and the statute runs from that date[3]; and the same rule applies to a share of an intestate's personalty[4].

No further time by reason of trust.

In all cases in which a person claims not in a direct way as owner, but by virtue of an express trust, the Act of 1874 specially provides that no action shall be brought except during the time within which the same could be brought if there were no trust[5].

Accrual of right.

The period for bringing an action, and after which the right or estate will vest in an adverse owner, dates, as has been noticed, from the time when the right first accrued, or from the last signed acknowledgment. There are several points that require to be specially noted in connection with the point of when the right is to be deemed to have first accrued.

The right of a person in possession first accrues on his being dispossessed; that of a devisee or heir, on the death of the testator or intestate; that of a grantee of a present interest, on the execution of the deed; that of the owner of a future estate, on its falling into possession; and that of a person entitled by forfeiture or breach of condition, upon such forfeiture or breach[6].

Forfeiture.

If then the owner of a particular estate is liable by reason of any forfeiture, or breach of condition,

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[1] 23 & 24 Vict., c. 38, sec. 13, and see *Re Johnson, Sly v. Blake* (1885), 29 Ch. D., 694; 52 L. T., 682; 33 W. R., 502.

[2] *Wood* v. *Penoyre* (1807), 13 Ves., 333.

[3] *Earle* v. *Bellingham* (1857), 24 Beav., 448. But in Ireland the time runs from the death (*Waddell* v. *Harshaw* (1905), 1 Ir. R., 416).

[4] *Re Johnson, Sly* v. *Blake* (1885), 29 Ch. D., at p. 970.

[5] 37 & 38 Vict., c. 57, sec. 10.

[6] 3 & 4 Wm. IV., c. 27, sec. 3.

to lose his estate before its ordinary determination, and he commits such forfeiture or breach of condition, an immediate right accrues to the person interested in reversion or remainder. But if the reversioner or remainderman does not choose to take advantage of this right, the question then arises whether the statutory period will at once commence to run, so as to bar the reversioner, or remainderman, after the lapse of the prescribed time from such forfeiture or breach of condition. This question must be answered in the negative, it being expressly provided that, in such a case, the right shall be deemed to have first accrued only at the time when the estate in reversion or remainder shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened[1]. The words "forfeiture" and "breach of condition" must be read in their largest sense, including forfeitures which give a right to an estate under a conditional limitation, as well as forfeitures which can only be taken advantage of by the heir[2]. This is a very important provision, as but for it a reversioner or a remainderman would find himself deprived of his estate because he has not chosen to take advantage of a right of entry that had accrued to him.

Tenant at will.

Next let us look at the question of when a tenant at will may gain a firm title by possession. It is provided[3] that where a person shall be in possession as tenant at will, the right of the person entitled, subject thereto, to enter shall be deemed to have first accrued at the determination of the tenancy, or at the end of one year next after the tenancy commenced, at which time such tenancy shall be

[1] 3 & 4 Wm. IV., c. 27, sec. 4.
[2] *Astley* v. *Essex* (1874), L. R., 18 Eq., 290; 43 L. J., Ch., 817.
[3] 3 & 4 Wm. IV., c. 27, sec. 7.

deemed to have determined; but that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this provision, to his mortgagee or trustee. Suppose A lets B into possession of land as tenant at will, and then very shortly afterwards demands possession, but B does not go. At the end of 12 years from the demand A will be statute barred, and B will have gained a good possessory title. But suppose A lets B into possession and never makes any demand constituting a determination of the tenancy; at the end of the first year time will begin to run in favour of B, and after 12 years from then, *i.e.*, 13 years in all from B's first entry, B will have gained a good possessory title by the Statutes of Limitation, unless in the meantime he has given some signed acknowledgment of A's right. The proviso as to mortgagors and *cestuis que trustent* may be explained thus: The mortgagor ordinarily remains in possession, and as the mortgagee has the legal title, in a sense the mortgagor is tenant at will, or at any rate a tenant at sufferance. The mortgage may continue a long time, and the intention is to prevent the mortgagee being barred of his legal rights against the mortgagor in possession. The trustee of an estate is the legal owner, but he may let his *cestui que trust* go into possession and directly enjoy the estate; and the object of the proviso is to prevent the trustee being barred of his legal right to recover possession from the *cestui que trust*.

Tenant from year to year.

A person may go into possession of land as an ordinary tenant from year to year or other period, without any lease in writing, and holding for a long time may, by reason of the Statutes of Limitation, claim a greater title than was granted to him. When has the right here first accrued to the landlord so as altogether to defeat his estate? It is

provided[1] that, in such a case, the right of the landlord shall be deemed to have first accrued at the determination of the first year or other period, or at the last time when any rent payable in respect of such tenancy shall have been received, whichever shall last happen. Thus A lets land orally to B at £20 per annum, but never takes the trouble to claim any rent from B; at the end of 13 years from B's entry A has lost all right to the estate. But suppose that for three years A received rent, and then stopped receiving it, here A would be barred at the end of 12 years from the last receipt of rent.

Lease in writing.

If a person is in possession of land under a lease in writing at a rent of at least 20s. a year, the landlord's right of entry first accrues at the date on which any payment of rent is first received by any person wrongfully claiming the land subject to the lease, unless some payment of rent is afterwards made to the rightful landlord[2].

Joint owners.

If several persons are entitled to land, either as co-parceners, joint tenants, or tenants in common, and one or more, but not all, enter, the tenant or tenants not entering will in due course be statute barred, as the possession taken by the other or others does not operate as a possession by all, but each possession is entirely separate[3].

Rent as between landlord and tenant.

In dealing with the Real Property Limitation Act 1874, it has been mentioned that the time to bring an action to recover any land or rent is 12 years[4]. This provision as to rent only applies to a claim against an adverse owner, and has nothing to do with the claim of a landlord to recover rent against

[1] 3 & 4 Wm. IV., c. 27, sec. 8.
[2] Ibid., sec. 9.
[3] Ibid., sec. 12.
[4] Ante, p. 208.

his tenant[1]. As regards the right of a landlord to recover the land from his tenant—where there is a lease, the landlord must sue within 12 years from the expiration of the tenancy[2], and in the case of a yearly tenancy, as has just been noticed, within 12 years from the expiration of the first year or the last payment of rent. This, however, has nothing to do with the point of what arrears of rent can be recovered. The Act of 1833[3] certainly provides that only six years' arrears of rent can be recovered; but a later statute of the same session[4] provides that an action for debt, upon a covenant to pay rent, may be brought within 20 years. It was decided in one case that the two enactments must be reconciled by saying that the first Act laid down a general rule, and the second Act engrafted an exception upon it, and that in tenancies in which there is no covenant under seal to pay the rent, only six years' arrears can be recovered, but in tenancies under an instrument containing such a covenant under seal, 20 years' arrears can be recovered[5]. In another case it was held that the first statute must be considered, in cases where there is a covenant under seal, as only defining what can be recovered by distress against the land, and that the second statute lays down what can be recovered in an action[6]. We, therefore, arrive at the result that in tenancies created orally, or by instrument not under seal, only six years' arrears of rent can be recovered, but that in tenancies created by an instrument under seal, which contains a covenant to pay rent, 20 years' arrears can be recovered.

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[1] *Grant* v. *Ellis*, 9 M. & W. (1841), 113; *Lewis* v. *Graham* (1885), 80 L. T. Newspaper, 66; *Darley* v. *Tennant* (1886), 55 L. T., 257.

[2] *Walter* v. *Yalden*, ante, p. 209.

[3] 3 & 4 Wm. IV., c. 27, sec. 42.

[4] 3 & 4 Wm. IV., c. 42, sec. 3.

[5] *Paget* v. *Foley* (1836), 2 Bing., N. C., 679.

[6] *Hunter* v. *Nockolds* (1850), 1 Mac. & G., 640.

Concealed fraud.

A very equitable provision has been made to guard against a person losing his estate or interest in land by reason of the concealed fraud of an adverse owner. It is enacted[1] that in every case of a concealed fraud, the right of any person to sue for the recovery of land, or rent, of which he has been deprived by such fraud, shall be deemed to have first accrued at the time when such fraud shall be, or with reasonable diligence might have been, first discovered. For the protection of persons acquiring interests for value, it is, however, provided[1] that this shall not enable an owner to sue to recover the property from a *bonâ fide* purchaser for value, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed. With regard to what is meant by "concealed fraud," it certainly means much more than mere ignorance of a right. Thus where a person occupied for the statutory period an underground cellar, without the knowledge of the owner of the surface, it was held that this was not a case of concealed fraud within the meaning of the statute[2]. The enactment is meant to apply to a case of designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving him the right, and, by means of such concealment, is enabled to hold the property[3]. The concealed fraud must be the fraud of, or in some way imputable to, the party who pleads the Statute of Limitations or someone through whom that party claims[4].

Rains v. *Buxton.*

By reason of ideas of prerogative, the Sovereign is not, as a general rule, bound in his public capacity

[1] 3 & 4 Wm. IV., c. 27, sec. 26.
[2] *Rains* v. *Buxton* (1880), 14 Ch. D., 537; 49 L. J., Ch., 473.
[3] *Petre* v. *Petre* (1852), 1 Drew, 397.
[4] *Mc Callum* v. *Mc Callum* (1901), 1 Ch., 143; 70 L. J., Ch., 206; 83 L. T., 717.

by the general words of an Act of Parliament, unless named, so that claims by the Crown are not barred by the Statutes of Limitation. Claims by the Crown to land are, however, now by the provisions of special statutes barred after the lapse of 60 years[1]. Crown.

At the present day there is no right or interest whatever acquired by a man in a woman's property by marrying her. He may, by reason of being her husband, when she dies, have certain rights, which is a matter we shall have to consider when dealing with devolution of property on intestacy. But although marriage in itself now gives no right whatever, it used to be very different, and has, as a matter of history, to be carefully considered. Besides that, a knowledge of the former law is necessary to understand the position of persons who were married before matters were placed on their present footing. 3. Rights obtained by a husband by marriage.

At Common Law, as regards real estate belonging to a woman, marriage produced the result that the husband acquired a freehold estate therein, for his own benefit, during the joint lives of himself and his wife—the effect of which was that he took possession or the rents and profits during the coverture, and that he could alienate the ownership during the coverture at his pleasure. If he survived his wife he might have a further estate for his own life (called curtesy), but that will be touched upon in the next chapter. The inheritance did not vest in the husband, but remained in the wife (subject to the husband's rights), and could only be disposed of by the joint act of both husband and wife. At first this joint alienation was accomplished by levying a fine. This Freeholds.

[1] 9 Geo. III., c. 16 (Nullum Tempus Act); 24 & 25 Vict., c. 62 (Crown Suits Act 1861).

cumbersome process was abolished by the Fines and Recoveries Act 1833, which provided[1] that a married woman might, with her husband's concurrence, dispose of land, and money subject to be invested in land, and of any estate therein, and release or extinguish any power, by means of a deed, she being separately examined[1] and acknowledging the same, to shew her free consent, before a judge or two commissioners to be appointed under the Act. By the Conveyancing Act 1882, acknowledgment before one commissioner is now sufficient[2]. Thus the law remains as regards a married woman to whom the common law rule still applies, whether the property belonged to her at the date of marriage or was acquired afterwards.

Leaseholds.

At Common Law, as regards leasehold property belonging to a woman, marriage produced the result that the leaseholds vested absolutely in the husband, and he could dispose of them in any way except by will, unless they were reversionary leaseholds which could not possibly fall into possession during the coverture[3]. If the husband did not dispose of the leaseholds of his wife during marriage, the survivor took them absolutely. Thus the law remains as regards a married woman to whom the common law rule still applies, whether the property belonged to her at the date of the marriage or was acquired afterwards.

Pure personalty.

At Common Law, as regards pure personalty—*choses in possession* vested absolutely in the husband; but *choses in action* only became the absolute property of the husband if he reduced them into possession during the coverture, *e.g.*, by recovering

[1] 3 & 4 Wm. IV., c. 74, secs. 77, 79, 80.
[2] 45 & 46 Vict., c. 39, sec. 7.
[3] *Duberley* v. *Day* (1852), 16 Beav., 33.

judgment and issuing execution, and if he failed to reduce them into possession during the coverture, they survived to the wife, unless she died first, in which case they belonged to him but he had to take out letters of administration.

Separate estate.

This great interest that the husband acquired by marriage was very much modified by the Court of Chancery, which allowed any property to be settled upon a married woman for her separate use, and when this was done she had an independent equitable estate, free from all legal control on her husband's part. It was at first considered necessary that the property should be vested in trustees for the woman's benefit; but it was afterwards established that this was not essential, and that whenever either real or personal property was given to a married woman for her separate use, even though there were no trustees, yet effect should be given to the intention of the parties. As regards real property, however, if there were no trustees, the legal estate was still in the husband by the Common Law, and, therefore, to make an effectual disposition of that, the conveyance by acknowledged deed was still necessary, as the wife could by herself only convey the equitable or beneficial interest. Later on the Court of Chancery also permitted property to be settled upon a married woman for her separate use without power of anticipation, the effect of which was to render it inalienable during coverture. Settlements of this kind can still be, and constantly are, made; but the Court now has power, on the application of a married woman, if it is shewn to be for her benefit, to enable her to dispose of the property notwithstanding the anticipation clause[1]. The whole subject of separate estate and the anticipation clause is most fittingly

Anticipation clause.

[1] 44 & 45 Vict., c. 41, sec. 39.

Indermaur & Thwaites' Equity, 420-432.

considered when studying Equity[1], as also is the doctrine of a wife's equity to a settlement, which sprung into existence to temper the harshness of the Common Law in giving a husband so great an interest in his wife's property[2]. Generally, in considering Equity, it will be seen that the various doctrines there established owe their origin to the state of the law with regard to a husband's interest in his wife's property.

Indermaur & Thwaites' Equity, 441.

Choses in action of married woman.

The husband's estate or interest in his wife's real and leasehold property was clear and definite; but with regard to outstanding personalty in the nature of a *chose in action*, it was conditional on reduction into possession, a thing not always easy of accomplishment. Suppose a married woman was entitled to a reversionary interest in personal estate other than leaseholds, and she and her husband desired to alienate it—they could not do so, because she, being under disability, could give no complete and binding assent to the disposition, and, therefore, if she survived, she could repudiate the transaction and assert her right by survivorship. This gave rise to the statute known as Malins' Act[3], which provided that every married woman might, with the concurrence of her husband, by acknowledged deed, dispose of every reversionary interest, whether vested or contingent, in any personal estate to which she might be entitled under any instrument (not being her marriage settlement) made after 31st December, 1857, unless restrained from anticipation. It will be observed that as regards women married before 1883, this Act still leaves reversionary interests in personalty in their prior unsatisfactory position, if the interest was acquired under the

Right by survivorship.

Malins' Act.

[1] Indermaur & Thwaites' Equity, 420-432.
[2] Ibid., 441.
[3] 20 & 21 Vict., c. 57.

marriage settlement, or under an instrument dated before 1858[1]. Subject to this, all difficulties are removed as regards alienation.

Statement of position prior to Married Women's Property Acts.

Before, therefore, we come to the modern Acts of Parliament affecting a husband's interests obtained by marriage, it is convenient to note the former position :—

1. As to real property, the husband acquired a qualified life interest, and the inheritance could be disposed of by the husband and wife together by deed acknowledged.

2. As to leasehold property, whether in possession or reversion (unless indeed it was impossible that it could fall into possession during the coverture), he acquired an absolute interest, but if he did not dispose of the property during coverture, on his predeceasing her it survived to the wife, notwithstanding any testamentary disposition by the husband.

3. As to pure personalty in possession, that vested in the husband, and became absolutely his property.

4. As to *choses in action*, including reversionary interests in pure personalty, they vested in the husband, and became his absolute property if he reduced them into possession, and if he did not do this they survived to the wife on his death, and there was no binding mode of disposition except in cases coming within the provisions of Malins' Act.

5. Property might be settled on a wife for her separate use, independently of her husband, and so that he had no beneficial interest therein.

Married Women's Property Act 1870.

This position was to some extent altered by the Married Women's Property Act 1870[2], the provisions of which statute, however, so far as they are necessary

[1] See *Re Elcom, Laybourn* v. *Groves-Wright* (1894), 1 Ch., 303; 63 L. J., Ch., 392; 70 L. T., 54.

[2] 33 & 34 Vict., c. 93.

to be considered here, only apply to women married on or after 9th August, 1870, and before the 1st January, 1883. This statute provides[1] as to her freeholds, that if they *descend* to her, the rents and profits thereof shall be to her separate use, thus depriving the husband of the former interest that he acquired during the marriage. As to her personalty, including leaseholds, it provides[2] that if she takes it as next-of-kin, it shall be to her separate use, thus depriving the husband of all the interest he formerly acquired; and there is a similar provision[2] if the personalty consists of a sum of money, not exceeding £200, coming to her under a deed or will.

Married Women's Property Act 1882.

But the Married Women's Property Act 1882[3] is very much wider in its scope. It came into operation on 1st January, 1883, and there are two distinct provisions in it to be here noticed. It provides, firstly[4], that as regards a woman who marries after it came into operation, all property which she is possessed of at the time of her marriage, or which she subsequently acquires, shall be to her separate use; and, secondly[5], that as regards a woman married before its commencement, all property, her title to which accrues after the commencement of the Act, shall be to her separate use. If, therefore, a man was married since 1882, he can have no possible interest in his wife's property, except by means of some settlement; but if he was married before 1883 then he may have an interest in her property, if her title thereto accrued before 1883. On this last point it has been decided that there can be but one accrual of title, so that where a woman married before 1883

Reid v. *Reid*.

[1] 33 & 34 Vict., c. 93, sec. 8.
[2] Sec. 7.
[3] 45 & 46 Vict., c. 75.
[4] Sec. 2.
[5] Sec. 5.

was entitled before that date to property in reversion or remainder, which falls into possession on or after 1st January, 1883, that is not property which has accrued to her since the Act; and the husband may, therefore, have an interest therein[1].

Reasons for a marriage settlement now.

It follows, therefore, that at the present day a husband acquires, during his wife's lifetime, no estate or interest in her property during marriage. There is, therefore, no longer any occasion to make a settlement of a woman's property on marriage to prevent the husband making away with it; but it is still in most cases advisable, because of the power that exists of settling the property without power of anticipation, which is a great practical protection against her making away with it during coverture; and also to secure a life interest to the husband after her death, and also to make a certain and secure provision for children that may be born of the marriage. These are good reasons, therefore, for still advising a settlement on a woman marrying, though it is not a matter of that vital importance that it was when a marriage gave a husband such extensive interests in his wife's property. It may also be observed that manifestly Malins' Act must in course of time become an obsolete enactment, and, even already, it is not practically of much importance.

Married woman trustee.

The position of a married woman who is a trustee is a matter that has been already dealt with in an earlier part of this work[2].

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[1] *Reid* v. *Reid* (1886), 31 Ch. D., 402; 55 L. J., Ch., 294, which case should be compared with and distinguished from *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D., 51; 59 L. J., Ch., 660; 62 L. T., 929.

[2] Ante, pp. 68-70.

CHAPTER VIII.

DEVOLUTION OF PROPERTY ON THE DEATH OF THE OWNER INTESTATE.

THE devolution of realty and personalty on the death of an owner intestate is so widely different, that it is necessary to consider the subjects separately, and it may be most convenient to deal firstly with personalty, which expression, of course, includes leaseholds.

I.—PERSONALTY.

Personalty.

On the death of a person intestate, his personal property vests in the President of the Probate Division of the High Court of Justice as legal owner and then devolves upon the person to whom letters of administration are granted by that Division, who may be the husband, or wife, of the deceased, or one of the next-of-kin, or even a creditor of the deceased, and whose title relates back to the death. Through the administrator, it devolves on the persons beneficially entitled thereto, subject, however, first to the payment of all duties, and the funeral and testamentary expenses, and the debts of the deceased. In the earliest times, on death intestate, the personalty of a deceased person vested in the Sovereign as *parens patriæ*, but even then it was applied much in the same way as now. In somewhat later times, the personalty of an intestate vested in the bishop of the diocese, or any other person who had ordinary jurisdiction in ecclesiastical matters, styled "the ordinary," and still later we find the ordinary directed to depute the next and most lawful friends of the deceased to

administer his goods[1], who were styled the administrators. The administrator was usually the nearest of kin, but the husband had the exclusive right of taking out letters of administration to his wife where administration was necessary. The position of whoever got administration was, that after paying the debts of the deceased, he could keep the residue for his own benefit, which was manifestly sometimes extremely unfair. It was, in consequence, found necessary to pass an Act of Parliament dealing with the subject, viz., the Statute of Distributions 1671[2], and this, as subsequently amended, contains the law as to the devolution of personalty on death intestate, when the deceased was domiciled in this country. Attention must be paid to the point of domicil, for it does not follow because a person dies possessed of personalty in England that it necessarily devolves according to the Statute of Distributions. If it consists of leasehold property, situate in England, it always devolves according to the Statute of Distributions, because, though personal property, leaseholds are land and have necessarily a fixed locality[3]. But as to pure personalty the rule is *mobilia sequuntur personam*, and it is only if the deceased was domiciled here that pure personal property devolves according to our laws, for if domiciled in another country, though possessed of pure personalty here, such personalty will devolve according to the law of that other country[4]. Domicil means much more than mere residence; it signifies the true, fixed, permanent home to which a person, wherever he may be, has the intention of ultimately returning; and this

Domicil.

Mobilia sequuntur personam.

[1] 31 Edw. III., stat. 1, c. 11.

[2] 22 & 23 Car. II., c. 10.

[3] *Duncan* v. *Lawson* (1889), 41 Ch. D., 394; 58 L. J., Ch., 502; 60 L. T., 732.

[4] Where, however, a person domiciled abroad dies intestate without heirs or next-of-kin, his moveables in this country go to the Crown and not to the State where he was domiciled (*Re Barnett's Trusts* (1902), 1 Ch., 847; 71 L. J., Ch., 408; 86 L. T., 346).

domicil[1] may be: (1) of origin, (2) by operation of law, (3) of choice. Thus the domicil of origin of a legitimate child is the domicil of his father; a woman on marrying acquires the domicil of her husband by operation of law; a person *sui juris* who voluntarily, and permanently, changes his place of residence, acquires a domicil of choice in the new country. We have only to deal with the devolution of personal property where the deceased person was domiciled in England, or it was leasehold property situate in England.

Rights of husband.

Taking first the position with regard to a married woman's personal property on her death intestate, we have already noticed that the husband is the person entitled upon her death to take out letters of administration to her estate, and, whether he does so or not, he is the sole person interested in her personalty. This seems always to have been so, and the Statute of Distributions has nothing to do with his right, it being expressly provided by the Statute of Frauds[2] that the Statute of Distributions shall not extend to the estates of married women dying intestate, but that their husbands may demand and have administration of their personal estates, and enjoy the same as they might have done at Common Law. It does not, however, follow that it is always necessary for a husband to take out letters of administration in respect of his wife's personal estate, for in some cases no administration is necessary, and he takes *jure mariti*. Where letters of administration are necessary to enable an action to be brought, it does not follow that the husband must obtain the grant; it may be obtained by another person, but, whoever it may be obtained by, the beneficial interest is entirely in the husband. The position is

[1] *Udney* v. *Udney* (1869), H. L., Sc., 441.
[2] 29 Car. II., c. 3, sec. 25.

a somewhat anomalous one, and requires a little explanation. At Common Law if a wife died possessed of *choses in action*, it was necessary that letters of administration should be taken out to enable them to be sued for; but as regards *choses in possession*, and leaseholds, by the Common Law they were vested absolutely in the husband, and on the wife's death no letters of administration were necessary. Even if *choses in possession*, or leaseholds, were held by a married woman for her separate use, the position was the same on her intestacy. As regards a husband's beneficial right, generally, in his wife's personal property, a question arose after the passing of the Married Women's Property Act 1882[1] whether that Act, by providing that a married woman shall be capable of holding property as if she were a *feme sole*, had not effected an alteration in the law, and taken away the husband's rights, but the contrary was decided[2]. The husband's beneficial right, therefore, remains exactly as before, but then comes the further question whether to complete his title he has to take out letters of administration. The position here also has been held to be exactly the same as it was before the Act. As regards *choses in action*, he, or someone, must take out letters of administration, but if the grant is made to anyone other than the husband, he only holds for the benefit of the husband, after paying the wife's debts[3]. As regards *choses in possession*, and leaseholds, there is no need for any letters of administration to be taken out, for they vest, as at Common Law, in the husband *jure mariti*, though he must be considered as his wife's legal personal representative even then, and is liable for her debts, only taking what may remain for

Re Lambert.

Surman v. *Wharton.*

[1] 45 & 46 Vict., c. 75.

[2] *Re Lambert, Stanton* v. *Lambert* (1888), 39 Ch. D., 626; 57 L. J., Ch., 927; 59 L. T., 429.

[3] Ibid.

Illustration.

his own benefit[1]. Thus, to illustrate the position, suppose a wife dies possessed of: (1) furniture; (2) a leasehold house; (3) consols and outstanding debts. As to (1) and (2) the husband takes *jure mariti*, and no letters of administration are necessary, but as to (3) letters of administration are necessary. In each case the husband is, however, his wife's legal personal representative, and only takes beneficially any balance remaining after payment of her debts.

Wife's rights.

Taking next the position with regard to a married man's personal property on his death, we have to consider the rights of his wife, to whom, as a rule, on his death letters of administration are granted, but whether granted to her or not her beneficial rights are the same. Her rights differ according to whether her husband has left children or other issue (grandchildren). If he has left a child, or children, or other issue, then she takes one-third of his personalty absolutely. If, however, he has left no child or children, or other issue, then under the Statute of Distributions she took a half share, but never under any circumstances more, so that if the husband left no next-of-kin the other half would go to the Crown. This seems an unjust state of things, and though the law cannot even now be considered satisfactory, yet certainly it has been improved by the Intestates Act 1890[2]. This statute does not affect the position where a husband dies leaving a child or other issue, but if he dies leaving no issue then the wife's position has been improved, and in dealing with this statute we have to notice that it, to some extent, affects the devolution of realty as well as personalty. It provides that where a husband dies intestate leaving no issue, and his whole estate (realty and personalty) does not

Intestates Act 1890.

[1] *Surman* v. *Wharton* (1891), 1 Q. B., 491; 60 L. J., Ch., 223; 64 L. T., 866.

[2] 53 & 54 Vict., c. 29.

exceed £500 in net value[1], it shall belong absolutely to the wife; but if it exceeds that net value, then she is first to receive a sum of £500, together with interest at 4 per cent. per annum from the date of the death until payment, payable rateably out of the realty and the personalty. After this, she then gets her half of the remaining personalty, and possibly dower. Thus suppose A dies leaving a widow and no issue, and possessed, after all expenses, charges, and debts, of £4000 cash, and a freehold house worth £1000. The widow is entitled to £400 out of the cash, and to £100 to be raised out of the freehold house. Then she gets half the remaining £3,600 cash, and possibly dower in the freehold house.

Re Twigg.

In construing the Intestates Act 1890, it has been held that, unlike the Statute of Distributions, it has no application to cases of partial intestacy[2]. Thus, if A makes a will which contains no residuary bequest, and there is £1000 residuary personalty, and he has left a widow and no issue, the widow here gets no preferential £500, but simply half of the residuary personalty, whereas if the Act had been held to have applied, she would have got first £500, and then £250, half of the balance, in all £750. If, however, the husband makes a will disposing of his property but *all* the gifts therein fail to take effect (*e.g.*, by lapse if all the beneficiaries and the executor predecease him), then he has died intestate within the meaning of the 1890 Act, and, if there be no issue, the widow does get her preferential £500[3].

Re Cuffe.

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[1] Realty is valued at 20 times its assessment to property tax, less any mortgage debt and the value of any rent-charge (sec. 5); life estates are valued under the Succession Duty Act (ibid.); and reversionary interests at their value at the date of death (*Re Heath* (1907), 2 Ch., 270; 76 L. J., Ch., 450).

[2] *Re Twigg*, *Twigg* v. *Black* (1892), 1 Ch., 579; 61 L. J., Ch., 444; 66 L. T., 604; 40 W. R., 297.

[3] *Re Cuffe*, *Fooks* v. *Cuffe* (1908), 2 Ch., 500; 77 L. J., Ch., 776; 99 L. T., 267.

Children's rights.

Having thus disposed of the interests of the husband and the wife, we will next look at the interests of children and other issue of the deceased. The children of a deceased woman take nothing if she left a husband surviving her; but the children of a deceased man take his whole personalty equally between them if he left no widow surviving, and if there should be only one child, he or she takes the whole. If, however, the deceased left a widow, then the child or children take only two-thirds, the widow, as has been stated, having one-third for her own use. If any child of the deceased has predeceased him, leaving a child, or children, then such issue take the share that his, her, or their parent would have taken had he or she been living. The child or children of the deceased take *per capita*, that is, in their own right, and the child or children of any child take *per stirpes*, that is, as representing his, her, or their parent. This principle of taking *per stirpes* applies to all issue (other than children) of the intestate, who must never be considered as taking in their own right, but as representing the deceased child from whom they spring and who would have taken if living[1]. Thus A dies intestate, leaving surviving him two children, B and C, and also two grandchildren, the children of D, a deceased child. A's personalty devolves in three parts, one part to B, another part to C, and the remaining part to the two children of D, the latter taking *per stirpes*. Suppose, further, that A dies intestate, having had three children, B, C, and D, who have all predeceased him, but leaving 10 grandchildren, of whom one is the child of B, two are the children of C, and the remaining seven are the children of D. A's personalty devolves in three parts, one part to the one child of B, one part equally between the two

Re Natt.

[1] *Re Natt, Walker* v. *Gammage* (1888), 37 Ch. D., 517; 57 L. J., Ch., 597; 58 L. T., 722.

children of C, and the remaining part equally between the seven children of D. Here there is equally a taking *per stirpes*, although there is no one of the prior class living[1].

Posthumous children.

In considering the interests taken by children, it should be observed that a posthumous child takes as if born in the parent's lifetime[2]. Another point that must be noticed is the provision contained in the Statute of Distributions with regard to hotchpot.[3] It is a provision which applies only to a father dying intestate, and not to a mother[4], and is to the effect that if the father has during his lifetime made advancements to any child of considerable amount, and something more than mere casual gifts or sums expended on maintenance or education, the child who has received any such advancement cannot share on his father's intestacy without first bringing into account the amount of the advancement. This provision only applies to personalty, so that a child who, as heir at law, takes realty on his father's intestacy, does not have to bring into account the value of the land. And the hotchpot is only applied in favour of other children and not of the widow[5].

Hotchpot.

Father's rights.

If a deceased person leaves no husband or wife, as the case may be, and no child or children or other issue, his personal estate devolves absolutely on his or her father, if living. If there is, or are, a child, or children, or other issue, the father takes nothing. If the deceased was a woman, who died leaving a husband, again the father takes nothing. If the deceased was a man, who died leaving a widow, the

[1] *Re Natt, Walker* v. *Gammage* (1888), 37 Ch. D., 517; 57 L. J., Ch., 597; 58 L. T., 722.
[2] *Wallis* v. *Hodson* (1740), 2 Atk., 114.
[3] 22 & 23 Car. II., c. 10, sec. 3.
[4] *Holt* v. *Frederick* (1726), 2 P. Wms. 356; *Bennet* v. *Benne* (1879), 10 Ch., D., 474; *Preston* v. *Greene* (1909), 1 Ir. R., 172.
[5] *Kircudbright* v. *Kircudbright* (1802), 8 Ves., 51.

father takes the whole personalty, subject to the widow's rights as already detailed.

Mother's brothers', and sisters' rights.

After the father, the mother took under the Statute of Distributions, but this was soon amended, it being provided[1] that the mother, brothers, and sisters should all take equally. They take, then, the whole of the personalty if there is no husband, wife, child, or other issue, or father of the deceased. If the deceased was a woman who died leaving a husband they take nothing; and if the deceased was a man who died leaving a widow, they take subject to the widow's rights. They can take nothing if there is, or are, a child, or children, or other issue of the deceased. If there is only a mother she takes the whole; if only a brother or sister, he or she takes the whole; if a mother, and a brother, or sister, or brothers and sisters, they take equally between them. The mother, brothers, and sisters, therefore, form a class by themselves, and it must further be noticed that should any brother or sister have died leaving issue, but any one of the class—mother, brother, or sister—is still living, then the child or children of the deceased brother or sister take the parent's share. Thus if A dies leaving surviving him a mother, a brother, and three nephews the children of a deceased sister, his personalty is divided into three equal parts; one part devolves on the mother, another part on the brother, and the remaining part on the three nephews, but whilst the mother and brother take *per capita*, the nephews take *per stirpes*.

Nephews' and nieces' rights.

But this principle of representation amongst collaterals, as distinguished from lineals, only applies if one of the prior class is living, for if this is not the

[1] 1 Jac. II., c. 17.

case, then nephews and nieces take *per capita*, and not *per stirpes*. Thus A dies intestate, leaving surviving him, as his nearest relatives, ten nephews and nieces. Nine of these are the children of one brother, and one is the child of another brother. The deceased's personalty will be divided into ten parts, and devolve equally between the nephews and nieces. The position is, as has been pointed out, utterly different as regards lineals, for there the devolution is always *per stirpes*[1].

Rights of remoter relatives.

The rights of remoter relatives are entirely governed by the direct rules of next-of-kinship, for there is no representation or taking *per stirpes* after brother's and sister's children. Thus if A dies leaving surviving him, as his nearest relatives, a nephew, and two grand-nephews, who are the children of a deceased nephew, the grand-nephews will get nothing, but the whole personalty will devolve upon the nephew. Of course grand-nephews and grand-nieces may take as next-of-kin if there is no one living of nearer degree; but if they take it must be *per capita*, and not *per stirpes*, and so it is throughout in considering the rights and interests of persons of remoter degree. Grandparents take before uncles and aunts, being a degree nearer the intestate. As long as there is anyone who can trace his or her next-of-kinship to the deceased, the personalty will devolve on that person, and if there be no next-of-kin at all, then the personalty of the deceased vests in the Crown as *bona vacantia*.

Half blood.

In tracing the devolution of personal property on an intestacy, it is important to notice that there is no distinction between the whole blood and the half

[1] See ante, pp. 234, 235, and *Re Natt, Walker* v. *Gammage*, there quoted.

blood of the same degree, as is the case in realty[1]. Whether of the half blood or of the whole blood, they are all equally near-of-kin to the intestate, and that is all that is required[2].

"Next-of-kin."

Those persons (other than a husband who, as we have seen, takes in a different capacity[3]) on whom a deceased person's personal estate devolves on his intestacy, are usually styled in general terms "next-of-kin according to the Statutes of Distribution," although this is not a strictly proper expression to apply to a wife, as she is not in that capacity next-of-kin at all, though she is a person entitled to a share under the provisions of the Statutes of Distribution. Next-of-kin, according to the Statutes of Distribution, are not, necessarily, strictly the nearest-of-kin, but they are the persons entitled under the provisions of these statutes. Thus if A dies intestate, leaving surviving him a mother, brother, and sister, they are all "next-of-kin according to the Statutes of Distribution," although the mother is really nearest-of-kin. If, therefore, in such a case a gift were made by will to the "next-of-kin" of A *simpliciter*, the mother would alone take, so that if it is desired under such a gift that the property should devolve as on an intestacy, it would be necessary to make the bequest to the "next-of-kin of A according to the Statutes of Distribution," and then the mother, brother, and sister of A would take equally. So, again, if A dies, leaving a child and a grandchild (the child of a deceased child), or a brother and a nephew (the child of a deceased brother), neither the grandchild in the one case, nor the nephew in the other, could ever take under a gift to "next-of-kin" *simpliciter*, though each would take an equal share on an intestacy, or

Gift to next-of-kin.

[1] Post, p. 249.
[2] *Smith* v. *Tracey* (1766), 1 Mod. Ca., 209.
[3] Ante, p. 230.

under a gift to "next-of-kin according to the Statutes of Distribution," or "to the persons entitled if the deceased had died intestate"[1]. But a gift to "next-of-kin," either *simpliciter*, or by reference to the Statutes of Distribution, never includes a husband or wife[2], neither of whom is in any proper sense, as husband or wife, "next-of-kin" to the deceased, though he, or she, may be the person on whom the personalty, or a share in it, would devolve by law on an intestacy.

II.—Realty.

Realty.

We will now, having dealt with personalty, proceed to consider the devolution of realty on the death of the owner intestate. In the same way that we have seen that neither husband nor wife is, as such, "next-of-kin" to the other (though the husband takes the personal property of his wife under the Common Law and the provision contained in the Statute of Frauds[3], and the wife also takes a share in her husband's personal estate under the provisions of the Statutes of Distribution), so also in realty neither husband nor wife can, in that capacity, be heir to the other. Each, however, has, or may have, a certain estate or interest in the freehold or copyhold land of the other, such estate or interest of the husband being called curtesy, and that of the wife dower, or in copyholds, freebench. Subject to these rights, real estate on intestacy goes to the heir of the deceased. As regards devolution of realty, the domicil of the deceased is of no importance, for it is the *lex loci sitæ* that governs, which, it must be remembered, by the way, is also the same with regard

Lex loci sitæ.

[1] *Re Gray, Akers* v. *Sears* (1896), 2 Ch., 802; 65 L. J., Ch., 858; 75 L. T., 407.

[2] *Kilner* v. *Leech* (1847), 10 Beav., 362; *Re Fitzgerald* (1889), 58 L. J., Ch., 682.

[3] Ante, p. 230.

to leaseholds. Until lately the tenant by curtesy, or by dower, or the heir, has taken in a direct way, and not like persons taking personalty on an intestacy, who only take through the channel of the administrator. A great alteration in the law on this point was, however, effected by the Land Transfer Act 1897[1] as regards persons dying on or after 1st January, 1898, it being provided that where real estate is vested in any person without any right in any other person to take by survivorship (*e.g.*, joint tenancy), it shall on his death, notwithstanding any testamentary disposition, vest in his personal representatives as if it were a chattel real[2]. No definition of "real estate" is given by the Act, but it is not[2] to include the legal estate[3] in copyholds or customary freeholds, where admission is necessary to perfect the title of a purchaser[4], and therefore this still vests directly in the devisee or heir. The expression "real estate" is a wide one, and must include not only freehold land, but all strictly incorporeal hereditaments, *e.g.*, manors, tithes, rent-charges, advowsons; and it includes equitable as well as legal estates[5]. The Act also applies to real estate over which deceased exercised a general power of appointment by will[6]. The general object of the Act is clear enough, viz., to make the realty and personalty all vest in one and the same person, for the purposes of convenience of administration. No alteration whatever is made in the ultimate devolution, and the executor or administrator must be regarded simply as a person through whom the property passes in the course of its devolution, though the executor or administrator has a power to deal with it whilst it is

Land Transfer Act 1897.

[1] 60 & 61 Vict., c. 65.
[2] Ibid., sec. 1.
[3] It does include equitable interests in copyholds.
[4] *Re Somerville & Turner's Contract* (1903), 2 Ch., 583; 72 L. J., Ch., 737; 89 L. T., 405.
[5] *Re Somerville*, supra; *Re Harrowby & Paine* (1902), W. N., 137.
[6] 60 & 61 Vict., c. 65, sec. 1 (2).

in him, should such a course be necessary, with a view to raising money for the purposes of the estate. The executor or administrator is not meant, however, to hold the real estate for a longer period than is necessary, and it is provided[1] that, at any time after the death, he may assent to any devise, or may convey the land to any person entitled as heir, devisee, or otherwise. If he does not do this, then at the end of a year from the death of the owner application may be made by the devisee or heir to the Court, and the Court, if satisfied that the executor or administrator does not require the property for the purposes of the estate, may order him to duly vest it in the heir or devisee[1]. Subject, therefore, now to this intermediate devolution to the personal representatives of a deceased owner, land devolves exactly as heretofore. But, apparently, the Land Transfer Act does away with the common law rule that the heir could not disclaim any estate coming to him by descent, for the heir now gets no legal title without a conveyance by deed from the personal representative, and there is nothing in the Act to compel the heir to accept such a conveyance[2]. A devisee or grantee of an estate in land has always had the right to disclaim[3].

Assent or conveyance by executor or administrator.

In a previous chapter[4] we have noticed the position with regard to a husband's interest in his wife's freeholds during her life. At her death intestate, he may have a further interest, viz., Curtesy, which is an estate for his own life in her freeholds of inheritance, provided he has had heritable issue by her, born alive during the coverture. Curtesy only arises in lands the wife was entitled to in

Husband's interest in wife's land.

[1] 60 & 61 Vict., c. 65, sec. 3.
[2] But see Williams' Real Property, 85.
[3] *Winder* v. *Lewes* (1837), 7 A. & E., 212; *Mallott* v. *Wilson* (1903), 2 Ch., 494; 72 L. J., Ch., 664.
[4] Chap. VII., ante, pp. 221-227.

possession, and does not apply to joint tenancy. In gavelkind lands, the husband's curtesy extends only to one-half of the lands, but he has it irrespective of the birth of issue, and he loses it on marrying again. The question has arisen whether the Married Women's Property Act 1882 (by providing that a woman married on or after 1st January, 1883, shall be capable of holding her property as a *feme sole*) has deprived a husband of his estate by the curtesy, but it has been decided that it has not, and that in the same way that before the Act the husband was entitled to curtesy out of lands settled to the separate use of his wife, so also is he entitled to curtesy out of lands which are made her separate estate by this statute[1]. On a married woman, therefore, dying intestate, possessed of freehold or copyhold land, the descent to the heir is subject to the husband's previous, possible, estate for his life by the curtesy.

Hope v. *Hope*.

Wife's interest in husband's land.

In the same way that a husband may thus acquire an estate or interest in his wife's freehold, or copyhold, lands on her death intestate, so also may a wife possibly acquire an estate or interest in her husband's freehold, or copyhold, lands on his death, and this is called Dower in freeholds, and Freebench in copyholds. Dower is a matter requiring more attention than curtesy, because the position with regard to it is now so utterly different from what it originally was, and a knowledge of the history of the law with regard to the matter is absolutely essential.

Dower at Common Law.

Dower, as it existed at Common Law, consisted of a life estate which a widow was entitled to in an undivided one-third part of all freehold land which her

[1] *Hope* v. *Hope* (1892), 2 Ch., 336 ; 61 L. J., Ch., 441 ; 66 L. T., 522.

husband was actually, or legally, seised of in possession, for an estate of inheritance, at any time during the coverture, and to which any issue she might have had might by possibility have been heir. Thus she might have dower out of a fee tail estate, as well as a fee simple estate, and without the actual birth of issue, which was an essential for curtesy, provided only that she possibly could have had issue capable of inheriting. In gavelkind, the wife's dower extends to one-half of the lands, but she loses it by marrying again, or becoming unchaste. Like curtesy, dower could not attach to an estate the husband held in joint tenancy; but, unlike curtesy, there was no dower out of a merely equitable estate held by the husband. The fact that in curtesy the husband would get a life estate in the whole, and in dower the wife would only get a life estate in a third, was only what might have been expected, for the estate by the curtesy was evidently based on the husband's dominant rights, and the estate in dower on the necessity of some provision being made for the wife. It was, probably, this idea of the necessity of there being a provision for the wife which caused her right to exist, not only out of lands of which her husband might die possessed, but also out of all lands of which he had been possessed at any time during the coverture. This rendered dower a serious bar on alienation, for how could anyone safely purchase land of a married man, bearing in mind that, if his wife outlived him, she could assert her right to have one-third part of the land allotted to her for her life, notwithstanding the sale by her husband?

Old modes of barring dower.

The inconvenience here existing could certainly be got over by the husband and wife joining to levy a fine, for this was held to bar her claim to dower, in the same way that it was also held to be effectual to

bar or defeat an estate tail[1]. But this was both troublesome and costly, and it required the wife to be a consenting party. Conveyancers certainly devised a mode of conveyance which sometimes was effectual, viz., by conveying the land to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser, thus making the trustee and the purchaser joint tenants, and declaring a trust for the purchaser of the interest of the trustee; but this plan possessed the manifest defect that if the trustee happened to die during the purchaser's life the latter became at once solely entitled in possession, and, therefore, dower would attach[2]. Another mode resorted to for the purpose of barring dower was legal jointure. It will be remembered that lands were very frequently conveyed to uses before the passing of the Statute of Uses, and that the use was but an equitable estate[3], and that being so no dower would attach to the use. But when the Statute of Uses was passed, these equitable uses became legal estates, and therefore liable to dower. This was evidently thought of by the framers of the Statute of Uses, for by that Act it was provided that a man might bar his wife of her dower by making a competent provision for her of freehold land before marriage, for her life at least, to her direct and not to a trustee for her, and to take effect immediately on the death of the husband[4]. For this provision, therefore, to be any good, it was necessary that a man should have freehold land he could thus settle, and that he should make the provision before marriage. If the requirements of the statute were not strictly complied with, then the wife's right to dower was not barred, and she could claim both her dower and the ineffective provision for her which

Legal jointure.

[1] Ante, p. 162.
[2] Williams' Real Property, 316.
[3] Ante, p. 49.
[4] 27 Hy. VIII., c. 10, secs. 6-9.

her husband had made. However, the Court of Chancery did not permit this, and though recognizing that a provision not complying with the requirements of the Statute of Uses did not bar her dower, put her to her election which of the two things she would take. This, therefore, came to be styled equitable jointure. Equitable jointure.

The serious inconvenience of dower forming a bar to the free right of alienation of the owner of land continued, therefore, more or less, to exist for a considerable time, but at last conveyancers found a method of evading the law and doing away with the inconvenience, and this was by a conveyance to uses to bar dower. If a man became possessed of an estate of inheritance in possession at any time during his married life, his wife might claim dower at his death. The problem was, how to so vest an estate in a man that he should have a full disposing power over it and yet his wife could have no claim to dower at his death. If X was purchasing land, and he was simply enfeoffed of it, here at once if he was then married, or if he subsequently married before he had disposed of the property, was such an estate vested in him that dower attached. But suppose X took his conveyance thus—first, to such uses as X should by deed or will appoint; secondly, until he appointed to the use of X for life; thirdly, with remainder, on the determination of his life estate by forfeiture or otherwise during the life of X, to the use of a trustee and his heirs during the natural life of X in trust for X; and fourthly, to the use of X and his heirs. Here, to start with, X, under the power of appointment, obtained a full disposing power over the property, and no dower could attach to that, because the power is only an authority, and not an estate. Then X had a legal life estate, and the possibility of the forfeiture of that life estate was Uses to bar dower.

recognized, and an improbable, but yet possible, estate was given to a trustee by way of vested remainder. Then came the limitation to X and his heirs, which gave him a fee simple, but this fee simple was not in possession, and the vested estate in the trustee prevented the life estate merging in it. Consequently, though practically X had the entire estate and interest in the property, he never had exactly the kind of estate which was necessary, by the law, to make the wife's right of dower attach. The scheme was ingenious, it worked admirably, and all conveyances to a man came commonly to be framed in this way. Practically a wife's right to dower on her husband's death was thus rendered a matter under the control of her husband.

Dower Act 1833.

So matters continued until the Legislature awoke to the absurdity of taking a conveyance in this complicated manner for the purpose of evading a law which everyone recognized as unsatisfactory, and passed the Dower Act 1833[1], which applies to all persons married after 1st January, 1834. It makes three great alterations in the law of dower, viz.: (1) Dower is only to exist in respect of lands of which a man dies possessed, and which he has not disposed of by his will; (2) Dower may be barred by a simple declaration by the husband to that effect contained in any deed or in his will; (3) Dower is given to a woman out of equitable estates of her husband, subject to the two foregoing points. In alteration (1) we find the whole objection to dower removed, in that it no longer forms a bar to alienation, and can only be claimed against the heir. In alteration (2) we find the husband enabled even to deprive his wife of dower as against the heir. This seems an unnecessary

Three alterations.

[1] 3 & 4 Wm. IV., c. 105.

provision, and though such a clause may be inserted in a purchase deed, it is not usual, for, if a man dies intestate, surely his wife ought to be entitled to dower as against the heir. In alteration (3) we find an extension of the widow's right to dower, but of a very slight and unimportant nature. Dower, then, now is not of the great practical importance that it once was, but a knowledge of the subject is very necessary, even in a practical sense, for conveyances were taken to the old uses to bar dower long after 1833, viz.: whenever a purchaser happened to have been married on or before 1st January, 1834. Naturally, therefore, deeds in this form may occur in modern titles, and the student would be in confusion, either in the preparation or the perusal of an abstract, if he did not understand the former law upon the subject.

A gift by will does not bar dower.

There is another point in the Dower Act 1833 which it may be well to mention, viz., it enacts that no gift or bequest made by any husband to or for the benefit of his widow, of or out of his personal estate, or out of any land of his not liable to dower, shall defeat or prejudice her right to dower, unless his will shews a contrary intention. Thus A buys freehold property, and there is no declaration to bar dower in the purchase deed. A makes his will, but does not by it dispose of this property so that it descends to his heir, and his will does not contain a declaration against dower. He leaves his wife a legacy of £10,000 by his will, but, notwithstanding this, she can still claim dower out of this freehold property[1].

Freebench.

Freebench in copyholds is the equivalent of dower in freeholds, but there has, as a rule, always been

[1] 3 & 4 Wm. IV., c. 105, sec. 14.

this great difference, that it does not attach, even in right, until the husband's death, and therefore any alienation by him alone, even by contract, to take effect in his lifetime, has always defeated the widow's claim. A disposition by will also has always defeated freebench[1]. This state of things is, however, subject to any different custom that may exist in any particular manor. Where freebench does exist, it usually consists of a life interest in a divided third part of the lands, but sometimes of a life interest in the entirety. Freebench, though, of course, subject to any direct charge on the lands, is paramount to the claims of the husband's ordinary creditors[2], whilst as to dower, where it does exist, it is subject to all debts now, though it was otherwise before the Dower Act 1833[3]. The Dower Act 1833 does not apply to freebench[4].

Descent.

Subject to the husband's possible estate by the curtesy, and the wife's possible estate in dower, and subject also now to the provisions of the Intestates Act 1890[5], on the death of a person intestate his or her real estate descends to the heir. It is unnecessary to consider the old common law rules generally with regard to the devolution of realty to the heir on intestacy, though it will be necessary in considering the present law to briefly refer to the former law in connection with some few points. The Act mainly governing the subject at the present day is the Inheritance Act 1833[6], and it is to that statute, as amended on one point by the Law of Property Amendment Act 1859[7] (commonly

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[1] Carson's Real Property Statutes, 365.
[2] *Spyer* v. *Hyatt* (1855), 20 Beav., 621.
[3] 3 & 4 Wm. IV., c. 105, sec. 5.
[4] *Smith* v. *Adams* (1854), 5 D. M. & G., 712.
[5] Ante, pp. 232, 233.
[6] 3 & 4 Wm. IV., c. 106.
[7] 22 & 23 Vict., c. 35, sec. 19.

called Lord St. Leonard's Act), that we must apply ourselves.

The main rules of descent at the present time may be conveniently arranged as follows[1]:—

Rules of descent.

1. In every case the descent shall be traced from the purchaser, but the person last entitled shall be deemed the purchaser unless the contrary be proved.

2. The inheritance descends first to the issue of the purchaser in *infinitum*.

3. In the *same degree* of consanguinity—males are to be admitted before females, and the elder male takes before the younger male, and females all take together.

4. The lineal descendants in *infinitum* of any deceased person in the line of descent stand in the place of that deceased person and take as that deceased person would have done if living, and such descendants are preferred among themselves according to rule 3.

5. On the failure of lineal descendants of the purchaser, the estate shall descend to the nearest lineal ancestor, subject to the next rule.

6. No maternal ancestors can inherit until all the paternal ancestors and their descendants have failed; no female paternal ancestor, nor any of her descendants, can inherit until all the male paternal ancestors and their descendants have failed; and no female maternal ancestors, nor any of their descendants, can inherit until all the male maternal ancestors, and their descendants, have failed.

7. Half-blood relations of the purchaser can inherit; and take: (1) next after the same degree of the whole blood, if the common ancestor was a male, and (2) next after the common ancestor, if such

[1] Williams' Real Property, Part I., Chap. 9.

common ancestor was a female. So that the brother of the half-blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father, and their issue; and the brother of the half-blood on the part of the mother shall inherit next after the mother.

8. In the admission of female paternal and female maternal ancestors, the mother of the more remote male ancestor and her descendants is always preferred to the mother of the less remote male ancestor and her descendants.

9. Where there shall be a total failure of heirs of the purchaser, the descent shall thenceforth be traced from the person last entitled to the land, as if he had been the purchaser.

Chief alterations effected in Common Law.

The three most important alterations in the law of inheritance effected by the Inheritance Act 1833 are those above numbered 1, 5, and 7, and as regards rule No. 1 that was substantially amended in 1859 by Lord St. Leonard's Act, this forming rule No. 9. It will be advisable, therefore, to specially consider these points.

Purchaser.

The purchaser is now the *propositus* or stock of descent. Before 1834, with regard to property capable of seisin, the *propositus* was the person last seised, the rule being *seisina facit stipitem*; so that if A inherited land, he would not on his death be the *propositus* or stock of descent, unless he had got seisin of the land, but if he had become seised, then he was the *propositus*. The Statute of 1833 endeavoured to assimilate the law with regard to property capable of seisin, and the law as applied to matters incapable of seisin. Instead, however, of simply providing that the person last entitled should on his death be the *propositus*, it makes the last purchaser the *propositus*, and defines a "purchaser," for the

purposes of the Act, to mean the person who last acquired the land otherwise than by descent, escheat, partition, or inclosure. Thus, if X acquired an estate under a purchase deed, a settlement, or a will, he is a "purchaser," whilst if he took it by descent he is not. The distinction is not always important, but often it is. Suppose X acquires land as heir to his mother, who was a "purchaser," and then X dies intestate without children; X being entitled *ex parte maternâ*, and the mother being the *propositus*, the estate will descend to the heirs of the mother, and not the heirs of X, which, of course, shuts out the father of X, and all the heirs *ex parte paternâ*. This must be the continuous rule unless and until the line of descent is broken, and in the above instance it is quite open to X to break the line of descent and constitute himself the *propositus*. Suppose X conveys the land to A and his heirs, to the use of himself, X, and his heirs, although X will still have the estate, he takes it now under this disposition, and is a "purchaser," and consequently the *propositus*. A co-parcener can, naturally, never be a "purchaser," for he or she must have taken by descent, and even if partition is effected this does not alter that fact, for the co-parcener acquires nothing by the partition beyond a holding in severalty, instead of in co-ownership, and is still in of his estate by inheritance, and the partition has not broken the line of descent[1].

Breaking descent.

The distinction between the last person seised, and the last purchaser, being the *propositus* or stock of descent, is well shewn by referring to the ancient doctrine of *possessio fratris*. Suppose before 1834 A died intestate seised of land and leaving three children, viz., a son B, and a daughter C, by his first wife, and a son D by his second wife; on his death the land would

Doctrine of *possessio fratris*.

[1] 1 Stephen's Commentaries, 277.

descend to B, the eldest son. If B then died intestate and without issue, the question next arose whether the land went to B's sister C, or to his half-brother D. It depended entirely on whether B had acquired seisin, and thus made himself the stock of descent. If he had not done so, then the descent would still, on his death, be traced from A as the last person seised, and, therefore, D would next inherit, because males take before females, and no point of the half-blood not being allowed to inherit occurs, for D is of the whole blood to A. But suppose that B became seised of the land before he died. Then we find B the *propositus*, D utterly incapable of inheriting under the law as it then stood, because he was of the half-blood to the *propositus*, and C, therefore, the heir, for, as it was said, *possessio fratris facit sororem hæredem esse*. Now take exactly the same position since 1834, making A the "purchaser." On A's death the land descends to B, and on B's death, as he is not a "purchaser," the descent is still traced from A, and D must be the next heir, and not C, so that the doctrine of *possessio fratris* has no application whatever to the present law of descent.

Devise to person who would be heir.

If a testator by his will devises land to the person who would have been his heir had no will been made, such person now since the Act of 1833 takes under the will, and not by descent, which is the reverse of what was formerly the law. Such a person, therefore, is a "purchaser." Thus, if A devises his real estate to his right heirs, and leaves only two daughters, they are joint tenants in fee simple and not co-parceners[1]. Where an estate is limited to the heirs of a person without any prior limitation to such person, the descent is traced as if such person had been the

Devise to heirs without limitation to ancestor.

[1] 3 & 4 Wm. IV., c. 106, sec. 3; *Owen* v. *Gibbons* (1902), 1 Ch., 636; 74 L. J., Ch., 338; 86 L. T., 571.

purchaser[1]. Thus, suppose land is devised to the heirs of Mary Smith, who is dead, and John Smith her son is her heir. He takes under this devise, but on his death intestate, the descent will be traced not from him but from his mother[2]. This is an alteration in the law. The position is, under the same enactment, identical if the estate is limited to the heirs of the body of a person without any prior limitation to such person, but this is no alteration in the law, being the same as it was before[3].

9th rule of descent.

It is evident that injustice might sometimes occur by reason of the first rule of descent, the result of which was that, on failure of heirs of the last purchaser, the estate must escheat to the Crown, and it was to remove this injustice that the law was amended in 1859[4] by adding the ninth rule of descent. Suppose A, a woman, who is illegitimate, buys an estate, marries, and has one son B. On her death B is her heir, and the only heir she can possibly have, she being a bastard. B now dies intestate without issue. The descent is not traced from B, but from A who was the last purchaser. Here there is a total failure of heirs of the purchaser, and before 1859 the land must have escheated to the Crown. Since 1859 this would not at all necessarily be the case, for as the descent may now be traced from B, that will let in B's father if living, or, if dead, all B's relatives on the father's side, who, though incapable of being heirs to B's mother, are yet all capable of taking as heirs of B.

5th rule of descent.

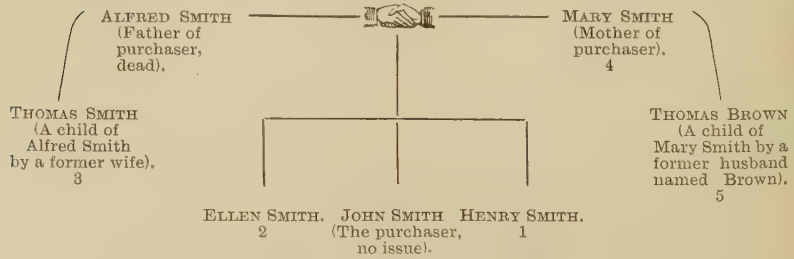
As regards the fifth rule of descent, it is a very sensible one. Before the Act of 1833 it was an old

[1] 3 & 4 Wm. IV., c. 106, sec. 4.
[2] *Moore* v. *Simkin* (1886), 31 Ch. D., 95; 55 L. J., Ch., 305; 53 L. T., 815.
[3] *Mandeville's Case*, Co. Litt., 26.
[4] 22 & 23 Vict., c. 35, sec. 10.

maxim of law, the reason for which it is difficult to trace, that an inheritance could never ascend, and a parent, therefore, could never take immediately by descent from his child, but the land would rather have escheated.

7th rule of descent.

The old law shutting out the half-blood was harsh, and the Act of 1833 alters it, but still makes a distinction in the position of half-blood as opposed to whole-blooded relatives, in which respect, perhaps, it is more sensible than the law with regard to personalty, as to which we have seen there is no distinction between whole-blood and half-blood[1]. The order in which the half-blood take depends upon whether the common ancestor was a male or a female, it being provided that, where the common ancestor was a male, the half-blood relatives shall take next after the whole-blood relatives of the same degree, and that where the common ancestor is a female, they shall take next after the common ancestor. The first part of this rule, as to the order of taking, is no doubt important, but the last part might as well have been omitted, as that must naturally have been the result, for the sixth rule is that no maternal ancestors shall be capable of inheriting until all the paternal ancestors and their descendants have failed, and the fourth rule is that the children of any deceased descendant shall represent their ancestor. A very simple illustration may assist the student:—


Alfred Smith (Father of purchaser, dead).
Mary Smith (Mother of purchaser). 4
Thomas Smith (A child of Alfred Smith by a former wife). 3
Thomas Brown (A child of Mary Smith by a former husband named Brown). 5
Ellen Smith. 2
John Smith (The purchaser, no issue).
Henry Smith. 1

[1] Ante, pp. 237, 238.

Here we see John Smith the purchaser. On his death, his father being dead, the estate descends to his brother Henry Smith, who is of the whole-blood to him, and then if he is dead without issue it goes to Ellen Smith, who is also of the whole-blood. She being dead without issue, we find that the purchaser has two half-brothers, one (Thomas Smith) on the side of his father, and the other (Thomas Brown) on the side of his mother. Thomas Smith takes, because the common ancestor being a male, his place is next after the issue of the whole-blood. Thomas Smith being dead, and assuming for the sake of simplicity that there is a total failure of all the paternal ancestors and their descendants, Mary Smith, the mother of the purchaser, takes next, and on her death Thomas Brown the half-brother takes. This is his natural and proper place, for he can only claim through his mother, and, therefore, must come after the half-blood on the father's side.

Other rules.

As regards the principle of males taking before females, which we find enunciated in the third and sixth rules, that has always been the law. The true meaning of the sixth rule is, that where, after due and sufficient investigation, there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors, then the descendants of the maternal ancestors must be sought for. Whether the paternal ancestors and their descendants are all extinct is a matter of fact for a jury, who may act on any reasonable evidence. Stricter proof is required of the exhaustion of branches of a family in recent than in earlier times, very slight evidence being sufficient in the case of remote branches[1]. The eighth rule is only a declaration of the law as to distant heirships and is not of much importance, as such claims rarely arise.

[1] *Greaves* v. *Greenwood* (1877), 2 Ex. D., 289 ; 46 L. J., Ex., 252.

Posthumous child.

A posthumous child is capable of taking as heir[1], but is only entitled to the rents from the date of his actual birth, and, if necessary, an apportionment must be made. Thus A dies intestate, leaving surviving him a daughter, but his wife is *enceinte*, and six months after A's death she gives birth to a son. A's real estate at first descended to the daughter, but on the birth of the son the legal estate shifts from the daughter to the son, the daughter, however, getting all rents up to the date of the son's birth[2].

Nemo est hæres viventis

It is incorrect to speak of any one as being heir to a living person. There can only be an actual heir to a deceased person, for *Nemo est hæres viventis*. Whilst a person is still living he may, however, have an heir-apparent, or an heir-presumptive. Thus A has a son, and this son is correctly described as A's heir-apparent; if A has, however, only a daughter she is heiress-presumptive, for she would be cut out by the birth of a son.

Copyholds.

The descent of a fee simple in copyholds is governed by the particular local custom of the manor, subject to the general principles introduced by the Inheritance Act 1833 and the Law of Property Amendment Act 1859[3], and this applies to trust estates in copyholds (including resulting or implied trusts) but not to executory trusts[4]. Here we may observe that on the death of a freehold or copyhold tenant of a manor, the lord is entitled to the

Heriot.

[1] A posthumous child can take by remainder under a settlement, as if born in the lifetime of the father, 10 & 11 Wm. III., c. 22.

[2] Carson's Real Property Statutes, 378, 379.

[3] *Muggleton* v. *Barnett* (1857), 2 H. & N., 653; *Re Smart* (1881), 18 Ch. D., 165. In the latter case, the custom was for the land to go to the youngest son or daughter, brother or sister, uncle or aunt; the tenant left only sons of dead uncles; and it was held that the custom failed and the lands went to the eldest son of the eldest uncle under the Inheritance Act 1833.

[4] *Re Hudson, Cassels* v. *Hudson* (1908), 1 Ch., 655; 77 L. J., Ch., 305; 98 L. T., 567.

best beast or other chattel (fixed by custom) of the deceased as a heriot. The lord can seize his heriot in any place, even though it has never been within the manor[1]. The heriot accrues on the death of a trustee, tenant by curtesy or dower, or tenant in common; but not on the death of a joint tenant or co-parcener, nor of a mortgagor in possession where the legal estate is in the mortgagee[2].

Peculiar modes of descent.

The peculiarities in the descent of gavelkind and Borough English lands have already been noticed[3], as also has the devolution of trust property on the death of a sole or last surviving trustee[4].

Escheat.

If a person dies intestate without heirs, his freehold property escheats to the Crown, *propter defectum sanguinis*[5], and his copyhold property escheats to the lord. Copyhold property, enfranchised by conveyance from the lord, escheats to the Crown; but if the enfranchisement was under the Copyhold Act 1894[6], the escheat is to the lord. Where a *cestui que trust* of land dies intestate without heirs, formerly the trustee held freed from the trust, but the beneficial interest now escheats as if it were a legal estate[7].

Intestates Act 1884.

[1] *Western* v. *Bailey* (1897), 1 Q. B., 86; 66 L. J., Q. B., 48.
[2] *Copestake* v. *Hoper* (1908), 2 Ch., 10; 77 L. J., Ch., 610; 99 L. T., 371.
[3] Ante, pp. 8, 9.
[4] Ante, pp. 56, 57.
[5] There is now no escheat *propter delictum tenentis*, except in the one case of outlawry in criminal proceedings (33 & 34 Vict., c. 23). See also post, p. 264.
[6] Ante, p. 26.
[7] 47 & 48 Vict., c. 71.

INTERLUDE.

It is convenient to pause here, for the purpose of noticing what has so far been dealt with in this work. We have considered the ownership of property, and the different estates and interests that are capable of being held therein, and have dealt with incorporeal as distinguished from corporeal property. We have also considered the right to alienate, and touched upon the various modes of alienation that have existed, and that do exist, and finally have seen the rights and interests that may be acquired irrespective of direct alienation. So far then we have dealt more with theory than with practice, although very many matters of practical conveyancing have also been touched upon; generally, we may say that a thorough knowledge of what has been dealt with up to this point is essential for a proper understanding of what is yet to come.

We have now, however, more particularly to deal with what are specially matters of practical conveyancing, though, as we proceed, principles must also necessarily be touched on. Here and there, no doubt, are matters essentially practical, and which can properly be treated as practice, distinct from principles, but the principles and practice of conveyancing are so mingled together, as a whole, that it is impossible to separate them, for as we deal with principles, matters of practice arise, and, in considering practice, the principles also come in. This work is not, therefore, separated into parts, or divisions, but merely into chapters, but always with

a view so to deal with the whole subject that matters shall be laid before the reader in the most intelligible order. To usefully study the principles of conveyancing without the practice is, in fact, impossible, for the two things are necessarily united; but the proper course is certainly to first grasp the principles, as far as possible, and then to practically apply them.

We shall now proceed to consider the title a person has to shew when he proposes to deal with his property, and the practical mode of dealing with it, particularly noticing the most important transactions, and the details to be observed, whatever the kind of alienation may be. Some other points of practical importance will also be considered.

CHAPTER IX.

THE TITLE TO BE SHEWN TO PROPERTY.

Title to personal chattels.

THE subject of title to chattels personal cannot be said in any proper sense to appertain to conveyancing, and though some few points in this chapter might equally be taken as applying also to that class of property, it is best for our purpose to exclude it from our consideration here, as being better considered in studying Common Law[1]. We have here to deal with the title to be shewn to real and leasehold property.

Indermaur's Common Law, 344-350.

There are three primary points to be considered by a practitioner who is instructed to proceed to a sale of his client's property (and in speaking of a sale, we must, of course, include a mortgage), and those three points are: (1) Has the client legal capacity to sell? (2) Has he got a title or right to sell? (3) Is it advisable to sell under an open contract, or with special conditions?

Incapacities.

By the first point is meant, not the nature or extent of the client's interest, but whether he labours under any personal incapacity which prevents his dealing with his property. As a general rule, a person who is possessed of, or entitled to property, has the free right of alienation, but this is not always the case. There are two chief incapacities, and they are infancy and insanity.

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[1] See Indermaur's Common Law, 344-350.

Infants.

An infant is capable of holding land, but, as a general rule, he cannot during infancy alienate. His infancy terminates on the day before the anniversary of his twenty-first birthday, and as the law recognizes no fraction of a day, on the very beginning of that day the incapacity ceases, and he is *sui juris*. An infant may, however, alienate gavelkind lands by feoffment at the age of 15[1], and may also make a valid marriage settlement, as hereafter explained[2]. Subject to this he himself has no direct and certain power of alienation, although under a provision in the Settled Land Act 1882[3] it is quite possible for his land to be disposed of. The Infants Relief Act 1874 does not make an infant's contract to sell land, or his conveyance of land, void, for the only contracts which are made void under it, are contracts for the repayment of money lent, for goods sold (other than necessaries), and accounts stated; but it does provide, in general terms, that the ratification after full age of any contract made during infancy is always void[4]. With regard to an infant's capability to alienate apart from the exceptional cases just mentioned, his position is as follows: Any contract for the sale of land, or conveyance of land, by the infant is not void but is primarily good, subject, however, to his right to avoid it on coming of age. No question of ratification is involved. If the infant likes he can, on becoming *sui juris*, absolutely avoid the transaction, but if he does nothing, and lets more than a reasonable time go by after coming of age, then he will be bound[5]. This appears to be mainly on principles of estoppel, and is equally true whether the transaction is a contract for the sale of land, a

Edwards v. *Carter*.

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[1] Ante, p. 8.
[2] Post, Chap. XV.
[3] Ante, p. 181.
[4] 37 & 38 Vict., c. 62, secs. 1, 2.
[5] *Edwards* v. *Carter* (1893), A. C., 360; 63 L. J., Ch., 100; 69 L. T., 153.

conveyance, a settlement, or a lease. The position is, in substance, exactly the same as before the Infants Relief Act 1874, except that whereas before that statute there might have been a ratification, that cannot now be the case.

Purchase by an infant.

It is convenient to notice that, with regard to the acquirement of land by an infant, by means of contract or conveyance, the position is the same. He may on coming of age avoid the transaction, or take to it; and if he has paid the consideration money or a deposit, there appears to be nothing to prevent him recovering it back, for he can restore the property, and the parties can be replaced in their original positions. If, however, the infant has fraudulently represented himself to be of age, possibly the position is different, though this is by no means certain.

Nottingham Building Society v. *Thurstan.*

The position of a person who lends on mortgage to an infant is well illustrated by *Nottingham Building Society* v. *Thurstan*[1]. X was an infant, who married, and then became a member of the Society. Next X contracted to buy freehold land from V for £393, and applied to the Society for a loan to complete the purchase and finish houses on the land. The application was granted. V conveyed the land to X for £393, of which sum £250 was paid by the Society. By deed dated the following day, X mortgaged to the Society for the £250 and further advances (which were duly made) up to £1000 more. After the Society had advanced the full £1,250 it discovered that X, who had been guilty of no fraud, was an infant. On attaining majority X sued the Society for possession of the land and the title deeds without paying the debt. Now the Building Societies

[1] (1903) A. C., 6; 72 L. J., Ch., 134; 87 L. T., 529; 51 W. R., 273.

Act 1874[1] allows an infant to become a member of such a Society, but the Infants Relief Act 1874[2] (passed a few days later) makes all contracts by infants to repay money lent void. Consequently, if an infant member borrows he can give the Society no security. It was therefore held that the mortgage deed for £1,250 was void, and the Society had no right to retain possession of the title deeds or of the land against X. But as £250 of the Society's money had been paid to V in discharge of the balance of purchase money, and as X had not repudiated the purchase at 21, and did not wish to do so, it was held that the Society, by subrogation, stood in the shoes of V, and were entitled to a vendor's lien on the land for this £250 only with interest at 4 per cent.

Insanity primarily produces an incapacity to alienate, but it is not correct to say that an insane person cannot make a good title. If A contracts to sell to B, or conveys to B, or mortgages to B, and B takes *bonâ fide* for value, without any knowledge that A is of unsound mind, B will gain complete rights under the contract, conveyance, or mortgage[3]. In the same way also, transactions under which, either by contract or conveyance, a person of unsound mind acquires property, may be perfectly good. But a person who has been found lunatic by inquisition becomes absolutely incapable of disposing of any part of his property by transaction *inter vivos* (even during a lucid interval), even to a *bonâ fide* purchaser without notice, until the inquisition has been superseded; though he may make a valid will during a lucid interval[4]. The committee

Insanity.

Imperial Loan Co. v. Stone.

Re Walker

[1] 37 & 38 Vict., c. 42, sec. 38.
[2] 37 & 38 Vict., c. 62, sec. 1.
[3] *Imperial Loan Co.* v. *Stone* (1892), 1 Q. B., 599; 61 L. J., Q. B., 449; 66 L. T., 556.
[4] *Re Walker* (1905), 1 Ch., 160; 74 L. J., Ch., 86.

of a lunatic so found is the person to alienate and deal with his property, subject to the directions and orders of the Judge, or Master, in Lunacy[1]. Where a person has not been found lunatic by inquisition, then proceedings may, nevertheless, be taken under the Lunacy Act 1890[2], and a person may be appointed to sell, mortgage, lease, or otherwise dispose of the lunatic's property, and generally to do all acts that the owner might have done had he not been lunatic[3].

Corporations.

Corporations may be under an incapacity to alienate, for the act may be *ultra vires*. As regards charities, however, though the trustees may not have direct powers of alienation, the Charity Commissioners have power, under the Charitable Trusts Act 1853[4], to authorize a sale of land belonging to a charity, upon the application of the trustees; and such sales have the same validity as if they had been directed by the express terms of the instrument creating the charity.

Convicts, and bankrupts.

A convict, and a bankrupt, are both persons under more than an incapacity, for their property has gone out of them. As to a convict[5], though there is now no forfeiture of his property since the Forfeiture Act 1870[6], except in the one case of outlawry in criminal proceedings, it vests in an administrator to be appointed by the Crown, who may now be the Public Trustee[7]. This administrator has full power to mortgage, sell, convey or transfer the convict's

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[1] 53 Vict., c. 5, sec 117, 118, 120.
[2] 53 Vict., c. 5.
[3] Ibid., secs. 110, 116, 120; 8 Edw. VII., c. 47, sec. 1.
[4] 16 & 17 Vict., c. 137, sec. 24.
[5] *I.e.*, any person against whom judgment of death or penal servitude has been pronounced or recorded for treason or felony, 33 & 34 Vict., c. 23, sec. 6.
[6] 33 & 34 Vict., c. 23.
[7] 6 Edw. VII., c. 55, sec. 2.

property[1], though he cannot bar an entail, as this must be done by the convict personally[2]. Until the appointment of an administrator, the property may vest in an *interim curator*, who is appointed by justices. At the expiration of the sentence the convict's property revests in him. During the period of sentence, therefore, a convict has no power of alienation, but there appears to be nothing to prevent him making a will, as that only comes into operation on his death, when the sentence naturally expires. As regards a bankrupt, it has already been shewn that bankruptcy completely divests him of his property[3].

Married women.

Married women who were married before the Married Women's Property Act 1882, and who also acquired their property before that Act, are under an incapacity to alienate without their husbands joining. The subject of marriage, as regards its effect on the ownership of property, has already been considered[4].

Limited owners.

Limited owners are manifestly, unaided by statute, under an incapacity to sell more than their own particular estates or interests. The powers of persons of this description to alienate far beyond their own estates and interests have already been sufficiently considered[5].

Assuming that a practitioner is satisfied that his client labours under no personal incapacity, the next point of inquiry is as to whether the client possesses

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[1] *Carr* v. *Anderson* (1903), 2 Ch., 279; 72 L. J., Ch., 534; 88 L. T., 503.

[2] *Re Gaskell & Walters* (1906), 2 Ch., 1; 75 L. J., Ch., 503; 94 L. T., 658.

[3] Ante, pp. 202-206.

[4] Ante, pp. 221-227.

[5] Ante, pp. 167-186.

a good title, and he naturally looks for the evidences of this title. These evidences are found in deeds, wills, and other documents, which will ordinarily, though not always, be found in the possession of the client. It is necessary to consider the subject of the right to possession of muniments of title.

ustody of itle deeds.

Generally, the person entitled to the legal estate in land is entitled to the custody of the title deeds relating to it. Thus trustees, having the legal estate, hold the deeds for the general benefit and safety of the various *cestuis que trustent*. If, however, the legal estate is in a tenant for life, he is entitled to the custody of the deeds[1]. And in the absence of special reasons to the contrary an equitable tenant for life may obtain an order from the Court to be let into possession and to have the custody of the title deeds[2]; and this rule applies to any person who has the powers of a tenant for life under the Settled Land Acts[3]. As regards joint owners, each has an equal right to custody of the deeds, and whichever can get possession of them may retain such possession, subject to granting inspection to the other or others. We may, therefore, often find a person possessed of a clear estate or interest in land, yet not in possession of the evidences of his title[4].

Acquirement of part only of lands.

Another case in which an owner of land may not have possession of the title deeds, is where he has only acquired part of the lands comprised in the deeds. It is specially provided by the Vendor and

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[1] *Re Beddoe* (1893), 1 Ch., 547; 62 L. J., Ch., 233; 68 L. T., 595.
[2] *Re Wythes* (1893), 2 Ch., 369; 62 L. J., Ch., 663; *Re Bagot* (1894), 1 Ch., 177; 63 L. J., Ch., 515; *Re Newen* (1894), 2 Ch., 297; 63 L. J., Ch., 763; 70 L. T., 653.
[3] *Re Richardson* (1900), 2 Ch., 778; 69 L. J., Ch., 804; *Re Money Kyrle* (1900), 2 Ch., 839; 69 L. J., Ch., 780; 83 L. T., 74.
[4] For a detailed statement as to the right of custody of deeds, see Hood & Challis, notes to sec. 9 of Conveyancing Act 1881, pp. 55, 56.

Purchaser Act 1874[1] that where a vendor retains any part of the land to which any documents of title relate he shall be entitled to retain such documents. This provision, however, only applies to estates and interests in land, so that where a mortgage comprised land, and a policy of insurance, and the mortgagee sold the land but retained the policy, it was held that he had no right to retain the mortgage deed, but must hand it over to the purchaser[2]. Where property held under one title is sold in different lots, then, in the absence of any contrary stipulation, the purchaser of the largest lot in value is entitled to the custody of the deeds; but if the conditions say the deeds are to go to the purchaser of the largest lot, that means the lot of largest superficial area[3].

Re Fuller Leathley.

A person who does not, on acquiring land, get possession of the muniments of title, should always secure a right to their production. He has, however, such an interest in connection with the deeds, that, it is submitted, he has in equity a right to call for their production, but this is doubtful, and should never be relied on. Until the Conveyancing Act 1881 came into force, the practice was for the person retaining the deeds, or to whom the deeds were handed over, to give to the person who did not get the deeds somewhat lengthy covenants for their production and safe custody. This Act has, however, substituted something more simple, but substantially the same in effect.

Right to productio

The Conveyancing Act 1881[4] provides that where a person "retains possession" of the documents of

Acknowle ment of r to produc

[1] 37 & 38 Vict., c. 78, sec. 2.
[2] *Re Fuller & Leathley*, or *Re Williams & Duchess of Newcastle* (1897), 2 Ch., 144; 66 L. J., Ch., 543; 76 L. T., 646; 45 W. R., 627.
[3] *Griffiths* v. *Hatchard* (1854), 23 L. J., Ch., 957; *Scott* v. *Jackman* (1855), 21 Beav., 110.
[4] 44 & 45 Vict., c. 41, sec. 9.

title, and gives to another an acknowledgment in writing of the right of that other to production of those documents and to delivery of copies thereof, it shall bind every person who from time to time shall have possession of the documents, such obligation ceasing as regards each person when the possession of the documents ceases; and every such person shall from time to time, unless prevented by fire or other inevitable accident, be bound to produce the documents at all reasonable times for inspection and examination, and in court on any legal proceedings, and also to furnish copies, all this, however, being at the cost of the person having the right to require, and requiring, the production and copies. The performance of these obligations may be enforced by an order obtained from a Chancery judge on originating summons. The acknowledgment does not confer any right to damages for loss or destruction of or injury to the documents; but if in addition there is given an undertaking for safe custody, then that imposes on the person retaining the documents, or the person for the time being having possession of them, an obligation to keep them absolutely safe, unless prevented from so doing by fire or other inevitable accident. If there is any loss or destruction, application may be made on originating summons to assess the damages, and the court may order payment thereof with costs. The objects of these provisions are (1) to substitute a simple form for a more complex one, and (2) to create an obligation which runs with the deeds as distinct from a personal contract. The provision appears to apply to all cases where a person does not get the deeds, whether they are retained by the vendor, or handed over to another purchaser. Everything that can be desired is accomplished by the acknowledgment and the undertaking combined, and they, or either of them, may be included in the purchase, or other deed, or

Undertaking for safe custody.

may form a separate and independent document. In all cases of sales by persons beneficially interested, where a purchaser does not get the muniments of title, or some of them, handed over to him, he is entitled to both an acknowledgment and undertaking unless there is some stipulation in the contract of sale to the contrary. Probably this is equally the case even if the vendors are not beneficial, but only fiduciary vendors ; but the ordinary practice is for fiduciary vendors to give the acknowledgment, and not the undertaking for safe custody. There is certainly no reason why a fiduciary vendor should take upon himself the extra liability which is imposed by the undertaking, and it is usual, to avoid any doubt upon the point, for fiduciary vendors, in the contract of sale, to expressly stipulate that they shall not be required to give the undertaking for safe custody.

Fiduciary vendors.

But though a purchaser very often, therefore, does not get the custody of the title deeds, and has to rest content with an acknowledgment of his right to production, and an undertaking for their safe custody, or, perhaps, an acknowledgment alone, he may always require, if he likes to pay for them, to be furnished with attested or examined copies. With regard to the acknowledgment and undertaking, it will be noticed that the obligations only rest on the custodian of the deeds for the time being. When the original custodian parts with the property and the deeds, then his obligations are ended and are taken up by the next custodian, and so on from time to time. In the same way the rights under the acknowledgment and undertaking run from time to time with the land, and are vested in the person who, for the time being, is the owner of the land in respect of which the acknowledgment or undertaking was given.

Right to attested copies.

spection der knowledg- ent.

Where, therefore, an owner has not got possession of the deeds and other documents of title relating to the property, it will often be found that he has in his possession an acknowledgment of right to their production, under which all necessary inspections of them may be obtained. As regard many of the muniments of title they are, as it is said, of record, and, naturally, will not be in any individual's possession, and inspection can be obtained at the proper place at which they are deposited, *e.g.*, in the case of certain legal proceedings affecting the property.

Having now considered the evidences of title, we have to look into the title itself, and see whether it is a good title, and it will be best, firstly to look at the title which, in the absence of any express contract between the parties, the law requires to be shewn on selling or mortgaging property. We will afterwards consider how the strict requirements of the law may usefully be curtailed by contract.

eneral rule to title.

The primary rule is that, on selling or mortgaging land, 40 years' title has to be shewn. This period of 40 years is, by the Vendor and Purchaser Act 1874, substituted for the period of 60 years which was formerly the rule, but it is also provided that an earlier title than 40 years may be demanded in cases similar to those in which an earlier title than 60 years might formerly have been required[1]. Thus, before this Act, if an instrument dating 60 years back did not in itself form a good root of title, it was necessary to go further back, and this is still the case as regards an instrument 40 years old, subject, however, now to an enactment in the Conveyancing Act 1881[2] that the purchaser of any property shall not

[1] 37 & 38 Vict., c. 78, sec. 1.
[2] 44 & 45 Vict., c. 41, sec. 3 (3).

require the production, or any abstract, or copy, of any deed, will, or other document dated, or made, before the time prescribed by law or agreement for the commencement of the title, even though the same creates a power which is subsequently exercised by an instrument abstracted in the abstract, nor shall any anterior information be required. It is also provided by the Vendor and Purchaser Act 1874[1] that recitals of facts in deeds or other documents which are 20 years old shall, unless proved to be inaccurate, be taken to be true, and shall be sufficient evidence. The result of this last provision was at first held to be that if a person who is selling or mortgaging his land on an open contract can point to a deed 20 years old, containing a recital that a certain person through whom he traces his title was then possessed of the property for the estate he is now purporting to dispose of, the purchaser or mortgagee cannot require any earlier title, but must be content with that instrument as the root of title[2]. But this has always been considered a doubtful decision, and it was recently expressly dissented from[3], and would probably not now be followed; and it is conceived the vendor is bound to furnish an abstract for the full 40 years. Here we stop as regards freehold and copyhold land, and summarize the matter thus: On an open contract a purchaser or mortgagee is entitled to 40 years' title. And if a good root of title at 40 years back cannot be shewn, then the title must be carried back further till a good root can be shewn. But if the conveying party can shew a deed 20 years old, containing such a recital as just mentioned, the purchaser or mortgagee must assume the correctness

Bolton v. *London School Board.*

Re Wallis & Grout.

Freeholds and copyholds.

[1] 37 & 38 Vict., c. 78, sec. 2.

[2] *Bolton* v. *London School Board* (1873), 7 Ch. D., 766; 47 L. J., Ch., 461.

[3] *Re Wallis & Grout* (1906), 2 Ch., 206; 75 L. J., Ch., 519; 94 L. T., 814.

of the recital unless he can prove it inaccurate, but can still call for the 40 years' abstract.

Leaseholds.

With regard, however, to leasehold property, certain further provisions have been made. Before 1874 the title to be shewn was 60 years, and if the lease had not been granted so long, then the lessor's title had to be shewn so as to make up the full period of 60 years. The Vendor and Purchaser Act 1874, as we have seen, substitutes 40 years for 60 years; and it further provides that under a contract to assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended assign shall not be entitled to call for the title to the freehold[1]. This enactment, it will be noticed, only prevents a purchaser or mortgagee from calling for the freehold title, and not for the leasehold title. Thus if A, a freeholder, grants B a lease, and then B agrees to sell this lease to C, C cannot call for any title beyond the lease to B; he has no right to investigate the title of A to grant the lease, however recently the lease was granted. But suppose that B, after A granted him the lease, made a sub-lease to X and X then agrees to sell this sub-lease to C; here C would have been able, notwithstanding the enactment in the Vendor and Purchaser Act 1874, to call for the earlier title back to the granting of the lease to B, though not beyond that. It has, however, now been provided by the Conveyancing Act 1881[2], that under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion. In the instance last put, therefore, C would not now have any right to go back further than the sub-lease to X. We may summarize

Vendor and Purchaser Act 1874.

Conveyancing Act 1881.

[1] 37 & 38 Vict., c. 78, sec. 2.
[2] 44 & 45 Vict., c. 41, sec. 3 (1).

the law as regards the title to be shewn on selling or mortgaging leaseholds, thus: A purchaser or mortgagee is entitled to 40 years' title if the lease has been granted so long, but if it has not been granted so long then he is only entitled to call for the lease itself and the title since, and he has no right to call for the title to grant the lease, whether it is a lease direct from the freeholder, or a sub-lease. If the lease has been granted more than 40 years ago, then he is always entitled to call for the original lease itself which he is purchasing or taking in mortgage, and for the title for 40 years preceding the transaction, any intervening period between the granting of the lease and 40 years back being omitted.

Whether the legal period of title is satisfactory.

The period of 40 years' title which ordinarily, therefore, has to be shewn to freehold or copyhold property, on selling or mortgaging it, is such as ought usually to satisfy anyone, and a purchaser or mortgagee may well be content with it. In the case of leaseholds, however, the title that a vendor or mortgagor has to shew may be very short indeed. A may agree to sell a leasehold house to B without any stipulation as to when the title is to commence, and it may turn out that the lease was granted to A only three years ago, in which case B would only get a three years' title. It is wise, therefore, for a person agreeing to purchase, or to advance money on a leasehold property, to inquire when the lease was granted, and if it was very recently, to specially stipulate for some earlier title, for, irrespective of the possibility of there having been no right to grant the lease, a purchaser or mortgagee will be bound by any restrictive covenants or other equitable rights or interests affecting the property[1]. Thus suppose A,

[1] *Patman* v. *Harland* (1881), 17 Ch. D., 353; 50 L. J., Ch., 642; 44 L. T., 729; and see also *Imray* v. *Oakshette* (1897), 2 Q. B., 218; 66 L. J., Q. B., 544; 76 L. T., 632; 45 W. R., 681.

Patman v. *Harland.*

in 1900, purchases freehold land and enters into restrictive covenants as to the class of property to be built on it. Then, in 1901, he grants B a lease. In 1904 B sells his lease to C on an open contract, so that C's title only commences with the lease, and there are no covenants of that nature in the lease. Nevertheless C will be bound by the restrictive covenants in the conveyance to A. His position, in fact, is just the same on this point as it would have been if he had bought before the Vendor and Purchaser Act 1874, and had specially agreed that he would not investigate the title beyond the lease. The Vendor and Purchaser Act 1874, and the Conveyancing Act 1881, only lay down the rule what the title is to be in the absence of contract; it is quite open to a purchaser or mortgagee to stipulate for an earlier title, and if he does not he may be said to have acted imprudently, and he may have, as a consequence, to suffer by being charged with constructive notice of things he must have learnt of if he had prudently stipulated for an earlier title.

Having dealt with the title to be shewn on an open contract for the sale or mortgage of freehold, copyhold, and leasehold property, let us now look at the title to be shewn to some other properties, and in some special cases.

Enfranchised copyhold.

Although the land being dealt with may be freehold, yet at one time it may have been copyhold, having been converted into freehold by means of enfranchisement[1]. In this case the position before 1881 was, that if the enfranchisement had taken place within 40 years (before 1874 within 60 years), the earlier title of the lord to the manor had to be shewn as well as that of the copyholder, so as to make

[1] Ante, pp. 24-26.

up the full period. The Conveyancing Act 1881[1], however, provides that where copyhold or customary land has been converted into freehold by enfranchisement, then on an open contract there shall be no right to call for the title to grant the enfranchisement. This enactment does not say that the entire title shall commence with the enfranchisement, but merely that there shall be no right to call for the title to make the enfranchisement. Thus, suppose a copyholder enfranchised in 1900 and agrees in 1910 to sell his enfranchised copyholds without any special stipulations as to title, the purchaser will be entitled to 40 years' title to the land, and this will consist of 10 years' title to the freehold, going back to the enfranchisement, and of 30 years' title to the copyhold before the enfranchisement.

Lands which have been exchanged.

Lands which are being sold may at some antecedent period have been the subject of an exchange, either (1) at Common Law, or (2) under the provisions of the General Enclosure Act 1845[2]. A Common Law exchange formerly implied a condition of re-entry, but such is not the case now since the Real Property Act 1845[3]. Formerly, therefore, where lands being sold or mortgaged had been taken in exchange for other lands at Common Law, it was necessary to shew a title not only to the lands being dealt with, but also to the lands given in exchange. Now, however, it is only necessary to shew the title to the lands being dealt with, for the simple reason that such an exchange no longer implies the condition of re-entry, or warranty of title, which it used to.

Common Law exchanges.

Exchanges under the General Enclosure Act.

As regards an exchange that has taken place under the provisions of the General Enclosure Act, the position is quite different. The effect of the order of

[1] 44 & 45 Vict., c. 41, sec. 3 (2).
[2] 8 & 9 Vict., c. 118, sec. 147.
[3] 8 & 9 Vict., c. 106, sec. 4.

exchange which may be made under that Act is to transfer the title to the lands given in exchange to the lands taken in exchange; in other words, on such an exchange, though each party gains different lands, he still keeps his own title. The title, therefore, to be shewn in such a case is the title to the lands given in exchange down to the time of the exchange, and since then the title to the lands taken in exchange. Thus, in 1890, A exchanged his estate known as Whiteacre for B's estate known as Blackacre, the exchange being carried out under the provisions of the General Enclosure Act. A is now selling Blackacre, which he acquired under the exchange. A has to shew the dealings with Blackacre since 1890, but as regards the antecedent period he has to shew the title to Whiteacre.

Allotments.

Waste lands of a manor are sometimes enclosed, and under the enclosure scheme portions of the lands are allotted to the different tenants, these allotments being then deemed of the same tenure as the land in respect of which the allotment is made. Thus if A is a freeholder in a manor, and has a portion of the waste allotted to him on an enclosure, this allotment is of freehold tenure, but if B is a copyholder in a manor, and has a portion of the waste allotted to him on an enclosure, this allotment is of copyhold tenure, unless indeed the lord of the manor and the allottee consent to its being freehold[1]. If the person who has thus had an allotment made to him desires to sell his allotment, and 40 years have not elapsed since the allotment was made, it will be necessary to go back beyond the allotment and shew the title to the land in respect of which the allotment was made, so as to make up the full period.

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[1] 8 & 9 Vict., c. 118, secs. 6, 94, 147.

Tithe rent-charge[1] can only properly be in lay hands, and the subject of sale or mortgage, if there has been a grant from the Crown of the tithe rent-charge, or more probably of the original tithe for which the tithe rent-charge has been substituted. The rule has always been that the title required by law to be shewn to tithes or tithe rent-charge is the original grant from the Crown, and then 60 years immediately preceding the particular period. This is the same now except that 40 years is substituted for 60 years[2]. Tithe rent-charge.

No alteration has been made as regards the title to be shewn to an advowson, and it is, as formerly, necessary, in the absence of express stipulation, to shew the title for 100 years back, and at the same time to furnish a list of presentations made during that period, so that the purchaser can see that the presentations have, from time to time, been made by the persons in whom the advowson is shewn at the time to have been vested. Advowsons.

We have, so far, been dealing with the title which is required by law to be given on selling or mortgaging property under an open contract, *i.e.*, one with no special stipulation as regards title. It is, however, open to a person to make any special stipulations, and this is constantly done. To carry back a title so far as 40 years often means a great deal of trouble and expense, and so also in some of the particular cases with which we have dealt would this equally be so in furnishing such a title as the law in its strictness requires. A practitioner, therefore, in proceeding to deal with property with a view to carrying out his client's instructions, should first Curtailment of period of title by contract.

[1] Ante, pp. 117-120.
[2] 37 & 38 Vict., c. 78, sec. 1; 1 Prideaux, 32; Dart, 331.

consider what length of title will be likely to satisfy a willing purchaser. Purchasers are by no means bent on having the full title the law allows, and, as a general rule, a property will sell just as well with a more limited period of title proffered than the full period allowed by the law in the absence of special stipulations. In some cases, also, a title is well known in the neighbourhood, and, in other cases, property is being sold in small lots. All these circumstances have to be considered, and what length of title should be offered is essentially a practical point for consideration. In some cases the dealings with property may have been but few, and there may be no difficulty in giving a full title, but in the majority of cases we may say that a vendor stipulates specially that he shall give only some title less than what would be required by the law. Care must be taken, however, not to offer too short a title, for that might have the effect of frightening persons from purchasing.

Root of title.

A practitioner having satisfied himself as to what length of title will probably satisfy anyone desirous of purchasing, next looks for a muniment of title at about that date which in itself constitutes a good root of title, and he then proceeds to stipulate in the contract which will be signed on the sale that the title shall commence with that instrument. As to what will constitute a good root of title, the instrument should be one that is in itself unassailable, standing by itself, and requiring no outside evidence to support it. A purchase deed, or a mortgage deed, is the very best root of title, for it is pretty certain that the anterior title was gone into and approved of at that time. Though this remark does not apply so forcibly to an ante-nuptial settlement, yet that also is a satisfactory root of title. A will is not a good root of title, because the purchaser is entitled to

evidence that the testator was possessed of the property at the time of his death, and, besides, there is no previous investigation of title to rely on. The very worst root of title to be selected is a voluntary settlement, as various questions can be raised on that, for: (1) it may possibly have been a fraud on creditors under 13 Eliz., c. 5[1]; (2) it may have been avoided by bankruptcy[2]; (3) it may have been avoided by a subsequent sale of the property by reason of 27 Eliz., c. 4, before the Voluntary Conveyances Act 1893 altered the law in this respect[3]. There is, however, nothing to prevent a special stipulation being made constituting any instrument the root or commencement of title and precluding a purchaser from going behind it or making any inquiries with regard to it; but if this is done, and the root or commencement is not a satisfactory and proper root of title, its nature must be clearly shewn, for if it is not, then a purchaser may say he has been misled, and, notwithstanding the special stipulations, may refuse to accept the title. Thus, where it was provided that the title to freeholds should commence with a certain deed less than 40 years old, which, in fact, was a voluntary settlement, but its nature was not stated, it was held that the condition was misleading and a purchaser was not bound to take the property with such a root of title, though if it had been plainly stated that the proffered root of title was a voluntary settlement then it would have been otherwise[4]. Anything may, in fact, be made a root of title if it is plainly stated just what it is, so that a purchaser is not misled, but of course if a shaky or poor root of title is offered, it is quite possible that will prejudice the sale of the property. Generally we may sum up the

Re Marsh & Earl Granville.

[1] Post, p. 510.
[2] Post, pp. 510, 511.
[3] Post, p. 510.
[4] *Re Marsh & Earl Granville* (1884), 24 Ch. D., 11; 53 L. J., Ch., 81; 48 L. T., 947.

subject of curtailment of title by express stipulation, by saying that it is always open to thus curtail it, but that, in so doing, the practitioner should act with prudence, and take care to offer such a title as a willing purchaser would naturally be satisfied with, and that, if he is commencing his title with an instrument which is not an accepted good root of title, he should plainly state what it really is.

Possessory title.

It is possible that in some cases an owner of land has nothing but a possessory title, that is, he can shew no title except that of adverse ownership, and we have seen that an actual title may be acquired in this way[1]. In such a case, if he sells under an open contract, the title to be shewn will be 40 years' possession, and it must be proved who was the rightful owner, and at what time his right of action accrued[2]. If, however, it is specially agreed that a purchaser shall be satisfied with a "possessory title," then a vendor is only bound to shew a title for such a period as will confer a good title under the provisions of the Real Property Limitation Act 1874[3], that is, 12 years, with a further period for disability of six years from it ceasing, but never more than 30 years.

Abstract of title.

The title is shewn by means of an abstract of title, which is prepared by the solicitor of the owner of the property. This abstract commences with the document constituting the root of title, and gives an epitome of that, and of all subsequent instruments affecting the property. Strictly, all such instruments must be set out, although they are of no present importance, *e.g.*, legal mortgages which have been paid off, and the reconveyances revesting the property.

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[1] Ante, pp. 207-209.
[2] Dart, 471.
[3] 37 & 38 Vict., c. 57; ante, p. 208.

Equitable mortgages.

Any existing equitable mortgages or charges should also be set out, and even if they have been paid off it would appear that, strictly, they ought to be referred to in the abstract, as they once affected the property, and a purchaser is entitled to see that they have been duly discharged. However, in practice, this is in general disregarded, and no harm can ensue by following this ordinary course, which indeed is convenient. As leases which have expired by effluxion of time cannot possibly affect the property, they need not be abstracted; but a lease alleged to have been determined by forfeiture, or notice, should be abstracted, as the purchaser or mortgagee is entitled to satisfy himself that it has really determined.

Expired leases.

Concealmer of matters affecting tit

If a vendor or mortgagor fails to disclose on the abstract any document affecting the title, he has not delivered a perfect abstract, and this may happen inadvertently, or by design. Any vendor or mortgagor, his solicitor or agent, who fraudulently conceals any instrument material to the title, with intent to defraud, is guilty of a misdemeanour, punishable by fine or imprisonment up to two years, with or without hard labour, or both; but such criminal proceedings require the sanction of the Attorney General, after notice to the person whom it is desired to prosecute[1].

Rules as to abstracting.

The abstract must contain a fair and reasonable statement of the contents of the various documents, all parts of every document being set out which may affect the judgment of the purchaser or mortgagee. Some parts which, under the circumstances, are of but little importance may, however, be abstracted very briefly, *e.g.*, trusts for sale where no sale has taken place thereunder. Generally, the practitioner must use his discretion, and whilst endeavouring to

[1] 22 & 23 Vict., c. 35, sec. 24.

aim at brevity, must yet take care that everything that may possibly be of importance is properly abstracted.

Time for preparation of abstract.

It does not follow that a practitioner about to put his client's property up for sale, or to prepare a contract for its sale, should at once prepare an abstract, for very frequently he contents himself by looking into the title from the deeds themselves, leaving the preparation of the abstract to a later date, when it is actually required for delivery. If, however, it is proposed, as is often the case, that counsel should first advise on title, it will be necessary to at once prepare the abstract, and in sales taking place under an order of the Chancery Division of the High Court of Justice this is absolutely necessary, as there the invariable practice is for one of the conveyancing counsel of the Court to first of all advise on title before the matter is allowed to proceed[1].

Cost of abstract.

Every purchaser or mortgagee is entitled to have delivered to him, at the expense of the vendor or mortgagor, a complete and proper abstract of title, and this is so even although the deeds are not in the possession of the vendor or mortgagor. This would manifestly be so in the case of a mortgage, for there the mortgagor pays the entire costs, but in the case of a sale the vendor, and the purchaser, respectively, pay their own costs. Suppose, for instance, that the title commences with a deed dated in 1870, and the vendor has in his possession no deeds anterior to 1890, but has a right to the production of the earlier deeds. He must, nevertheless, give the purchaser an abstract of all the deeds from 1870 downwards,

Re Johnson & Tustin.

[1] For the details of practice in sales under the Court's order, see Indermaur's Practice, 266-269.

although, as we shall hereafter see, the purchaser has to pay the costs of any subsequent production of the deeds not in the vendor's possession, for the purpose of verifying the abstract[1].

Sale in lots

Where a vendor sells property in lots, which are held wholly or partly under the same title, and two or more lots are bought by the same purchaser, he only has to deliver one abstract to such purchaser, and not a separate abstract in respect of each lot[2].

Importance of examining client's title

The importance of a practitioner carefully examining his client's title before he in any way allows him to attempt to deal with it, is manifest. He may on examining it, find difficulties which may induce him, in putting it up for sale, or arranging to sell it by private contract, to insert special conditions to prevent the points being raised. Or the matters may be of such importance that he may find it necessary to at once take steps to complete his client's title and render it perfect. If he finds that his client has created any incumbrance on the property, he has to bear in mind that this incumbrance will have to be cleared off, or else the property sold subject to the incumbrance. Very often a client has mortgaged his property, and he desires to sell, and that the mortgage money shall be paid off out of the purchase money. This presents no difficulty whatever, but a possible case is that the mortgagee cannot be found, or that there is no person who can give a good receipt for the money and join in the conveyance. Thus, A has mortgaged his property to B for £1000 and now desires to sell to C for £2000, B to be paid off out of the purchase money, but B went abroad last year, and no one knows where he is, or whether

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[1] *Re Johnson & Tustin* (1885), 30 Ch. D., 42; 54 L. J., Ch., 889; 53 L. T., 281. See also post, pp. 337, 338.

[2] 44 & 45 Vict., c. 41, sec. 3 (7).

alive or dead. This is a possible case, not only with regard to mortgages, but also other incumbrances.

Obtaining order of Court freeing land from incumbrance.

The Conveyancing Act 1881 has satisfactorily provided for cases of this kind. It enacts that where land which is subject to any incumbrance is sold, the Court may, on the application of any party to the sale, direct payment into Court: (1) in case of an annual sum charged on land, of such an amount as when invested in government securities will keep down or otherwise provide for that charge, and (2) in any other case of capital money charged on the land, of the amount of the incumbrance and any interest due thereon. In either case, there must also be paid into Court an additional amount to meet further costs, expenses, and interest, and any other contingency except depreciation of investment, not exceeding one-tenth part of the original amount paid in, unless for special reasons the Court requires a larger amount. The Court may then declare the land to be freed from the incumbrance, and make any order necessary for the conveyance or vesting of the property[1].

Title on granting a lease.

So far we have only dealt with the title to be shewn on sale or mortgage, and we must now look at the position as to shewing a title where it is proposed only to grant a lease. In ordinary practice a tenant is willing to take a lease without any title being shewn him, for he is merely paying a rent, which will cease if it turns out that the lessor has no title and he is ejected; and it may fairly be assumed that a person would not grant a lease without having a right to do so, and further protection is afforded to a lessee by the covenant for quiet enjoyment. Still, if a lessee is going to pay a large premium, and in effect

[1] 44 & 45 Vict., c. 41, sec. 5.

to purchase the granting of the lease, or is going to make a considerable outlay on the property, it may be inadvisable to take the lease without investigating the title. Technically, this observation must apply to all building leases; but then it must be borne in mind that usually the lessor is dealing generally with the property, and in a way that it is almost absurd to conceive he would act had he not a title, and with regard to ordinary building leases—at any rate where, as is often the case, the lessee is being financed by the owner—it is not usual to shew a title. Let us, however, look at what are the strict rights of the parties.

Position at Common Law.

At Common Law the position appears to have been that on an open contract to grant a lease, though the lessor could not be compelled to shew any title, yet he could not compel the tenant to take the lease without shewing a title; and if he would not shew his title, then the intending lessee could bring an action against him for damages, though it does not seem clear that he could recover any damages beyond any deposit he had paid and costs he had incurred[1]. The Vendor and Purchaser Act 1874, however, provides that on a contract to grant a lease, whether derived out of a freehold or leasehold estate, the intended lessee shall not be entitled to call for the title to the freehold[2]. This still left the intending lessee able to call for any leasehold title. Thus A, a freeholder, grants a lease for 99 years to B, B sub-leases to C for the whole term less 10 days, and C contracts to grant a sub-sub-lease to D for his sub-term less one day. Before the Vendor and Purchaser Act 1874, D would have been entitled to call for the full title going back to the freehold, but

Position under Statutes.

[1] *Stranks* v. *St. John* (1867), L. R., 2 C. P., 376; 36 L. J., C. P., 118.

[2] 37 & 38 Vict., c. 78, sec. 2.

since that Act he would only be entitled to go back as far as the lease to B, which would be his starting point of title. The Conveyancing Act 1881 has, however, further altered the position by providing that on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have a right to call for the title to that reversion[1]. Therefore, now in the above instance, D would have no right to call for any title beyond C's lease, but he would be entitled to call for that, for he certainly would have been so entitled at Common Law, and to more, and though the two statutes above quoted have taken away his other rights, they have not taken away his right to the title of his own lessor who has only got a leasehold interest. The Conveyancing Act 1881, in limiting his rights, only prevents him calling for the title to the leasehold reversion on the lease out of which he is acquiring his estate.

Gosling v. *Woolf*.

The case of *Gosling* v. *Woolf*[2] is illustrative of this. It is, unfortunately, badly reported, and has given rise to much discussion and doubt; it was decided by Common Law judges, and argued by Common Law counsel, and it may humbly be suggested that there is evidence of confusion on the part of judges, counsel, and reporter, all not perhaps thoroughly conversant with conveyancing—and yet the actual decision is right enough. It must not, however, be taken as an authority for anything beyond the actual decision. The plaintiff had agreed to take an underlease from the defendant, who was himself a leaseholder direct from the freeholder. The defendant refusing to supply any title whatever, the plaintiff sued to recover back a deposit that he had

[1] 44 & 45 Vict., c. 41, sec. 13.
[2] (1893) 1 Q. B., 39; 68 L. T., 89; 41 W. R., 106.

paid. It was held that he could succeed, in that though he was not entitled to call for the title to the reversion on the defendant's lease, yet he was entitled to call for that lease itself. It was argued that the Conveyancing Act 1881 (sec. 13) had taken any such right away, but that enactment only speaks of the reversion on the lease out of which the underlease is being granted.

Summary of present position.

The position, therefore, now as to title on granting a lease, may be summarized as follows: If there is no stipulation as to title, the lessor, if a freeholder, need shew no title whatever, but if he is a leaseholder, whether directly from the freeholder or by sub-lease, he must shew his lease out of which he is proposing to create the interest, and any dealings with it; but in no case has the intended lessee any right to call for the title to the reversion on that lease, whether such reversion is a freehold or a leasehold reversion. In granting an ordinary lease at a rent, the practical position is that the intending lessor does not expect, and cannot reasonably be asked, to shew a title, but if he is receiving a substantial premium, or the intending lessee is going to make a considerable outlay on the property, then he may reasonably expect to be asked to shew a title, and to what extent the title is to be shewn should form the subject of stipulation. Where the lessee is really buying the lease, by paying a heavy premium, or is going to make a considerable outlay on the property, he will be imprudent indeed, as a general rule, not to require any title, for, irrespective of actual badness of title, he may find himself bound by restrictive covenants and conditions and other equities affecting the property[1].

Practical position.

[1] *Patman* v. *Harland* (1881), 17 Ch. D., 353; 50 L. J., Ch., 642; 44 L. T., 728; *Imray* v. *Oakshette* (1897), 2 Q. B., 218; 66 L. J., Q. B., 544; 76 L. T., 632; 45 W. R., 681.

Settlements.

With regard to ante-nuptial settlements, at any rate in the case of a husband settling property upon his wife, a title ought to be shewn in the same way as on sale or mortgage, though, no doubt, it need not be given so fully, and so strict an investigation will not be expected as on a sale or mortgage. If the wife is settling property giving the husband an interest therein, strictly also she should shew her title, but this practically depends on circumstances. Naturally, in purely voluntary settlements, they being in the nature of gifts, no title is shewn.

We have now considered the general rules as to title, looked at in the light of the owner's position; we have noticed the question of capacity, the evidence of title, the length of title, and generally the mode of shewing the title, and a variety of other incidental points. As we proceed to consider contracts for the sale of land, and investigation of title, various other points will be dealt with, but at present we have sufficiently considered the owner's primary position.

CHAPTER X.

CONTRACTS FOR THE SALE OF LAND.

THE actual conveyance of land is usually preceded by a contract. This may be simply an open contract *i.e.*, one which ascertains the parties, the property, and the price, but leaves the other terms to be implied by law; or it may be a contract containing various provisions and stipulations, and particularly modifying the purchaser's right to compel the vendor to strictly prove his title. It may be a contract to sell privately or it may be a contract made at a sale by auction. We have to deal with all kinds of contracts for the sale of land, and the points to be considered in this chapter are: (1) the constitution of the contract; (2) the effect of the contract; (3) the details of the contract.

Open contract.

In considering the constitution of the contract, it must first be observed that all the ordinary principles of contract apply to contracts for the sale of land. There must be the four essentials necessary for any simple contract, viz.: (1) parties able to contract; (2) such parties' mutual assent to the contract; (3) a valuable consideration; (4) something to be done or omitted which forms the object of the contract. These are matters common to all simple contracts, and not necessary to be discussed here in detail, as the necessary knowledge is best gained by studying Common Law, as regards contracts generally[1].

1. The constitution of the contract.

Indermaur's Common Law, Part I., Chap. II.

[1] See Indermaur's Common Law, Part I., Chap. II.

Still, it may be advisable to remind the reader of a few specially important points.

No formal contract necessary.

It is not necessary that any formal contract should be drawn up. Any document, or documents, which contain the essential features of contract are sufficient, for an offer on one side, accepted on the other, constitutes a contract. But this acceptance must be exact and identical with the offer, for if any fresh terms are introduced there will be no *assensus ad idem*. It is not, however, always easy to determine whether or not a fresh term has been introduced. Thus, suppose A writes to B offering to sell him a house for £1000, and B writes accepting this offer, but adds: "I refer you to my solicitor, who will prepare a proper contract," the question at once arises whether, if no "proper contract" is ever signed, these two letters in themselves constitute a contract. It has been held that they do[1], for there is no real introduction of a fresh term or stipulation, but there is merely in contemplation the preparation of a more elaborate and complete contract, which does not, however, prevent the two letters in themselves constituting a contract. Again, suppose A writes to B offering to sell him a house for £1000, and B writes back accepting the offer, and adding, "subject to my solicitor approving the title," is there a contract here on these two letters? It has been held that there is[2], for the clause which is added merely means that the vendor must shew a good title, which is a term that the law itself imports. But if to a proposal or offer an assent is given subject to a provision as to a contract, the stipulation as to the contract is a term of the assent and there is no concluded agreement[3].

Fowle v. *Freeman.*

Hussey v. *Horn-Payne.*

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[1] *Fowle* v. *Freeman* (1804), 6 Ves., 351.

[2] *Hussey* v. *Horn-Payne* (1879), 4 App. Ca., 311; 48 L. J., Ch., 846.

[3] *Chinnock* v. *Ely* (1865), 34 L. J., Ch., 399; *Rossiter* v. *Miller* (1877), 46 L. J., Ch., 737.

Thus, where A and B drew up and signed an agreement for a lease of a certain house at a named rent for seven years, "subject to the preparation and *approval* of a formal contract," it was held that the agreement was not a contract[1]. And where A offered to sell a house for £1,700, "subject to agreement stating fully the conditions being prepared and signed," and B wrote a simple letter of acceptance, there was no contract[2]. In looking at the point that mere offer and acceptance may constitute a contract, we have also to bear in mind that an offer may be withdrawn before acceptance, and that there can be no acceptance to constitute a contract if the acceptor knows at the time that the offer has been withdrawn. Thus, A offers to sell B a house for £1000, and then whilst the offer is open he sells it to C. B gets to know of this, and then accepts the offer. There is no contract[3]. In noticing the point that a contract may be made out from different documents we must bear in mind the primary rule that these documents must be connected together *inter se* without the necessity of any extraneous evidence[4]. If the one document stands out separately and distinctly by itself, with no reference on its face to any other document, no connecting evidence can be given; but if one document shews that there is another document in existence connected with it, then parol evidence may be given to identify that other document. Thus, in one case the defendant agreed to sell to the plaintiff a freehold estate for £2,375 and signed a memorandum which contained all the essentials of a contract, except that it omitted to mention the property agreed to be sold. Two days afterwards the plaintiff,

Winn v. *Bull*

Watson v. *McAllum.*

Dickinson v. *Dodds.*

Boydell v. *Drummond.*

Oliver v. *Hunting.*

[1] *Winn* v. *Bull* (1878), 7 Ch. D., 29; 47 L. J., Ch., 139.
[2] *Watson* v. *McAllum* (1902), 87 L. T., 547.
[3] *Dickinson* v. *Dodds* (1876), 2 Ch. D., 463; 45 L. J., Ch., 777.
[4] *Boydell* v. *Drummond* (1809), 11 East, 142.

pursuant to the memorandum, sent the defendant a cheque for the deposit, and in part payment of the price, and the defendant replied by letter, "I beg to acknowledge receipt of cheque on account of the purchase money for the F estate." It was held that parol evidence was admissible to explain the circumstances under which the letter was written, and that as such evidence connected the letter and the memorandum, the two documents, read together, constituted a sufficient contract[1].

Writing necessary.

A mere oral contract for the sale of land is not binding, the Statute of Frauds[2] providing that any contract relating to lands must be in writing, signed by the party to be charged[3] therewith, or his agent, who, however, need not be authorized by writing. Notwithstanding this enactment, an oral contract for the sale of land will become binding where there has been a part performance of it. This is a doctrine of Equity which now, since the Judicature Acts, is of generally prevailing force; but, as the matter appertains to Equity, it need not be gone into here, though we may say that, to constitute a part performance sufficient to make an oral contract for the sale of land binding, it must be something which is exclusively referable to the agreement, done with no other view than to perform it, and of such a nature that it would be a fraud, after allowing it to be done, not to carry out the contract. As a general rule, nothing but letting a purchaser into possession, under and in pursuance of the oral contract, will be recognized as a sufficient part performance. There are also some other exceptional cases in which an

Lester v. *Foxcroft.*

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[1] *Oliver* v. *Hunting* (1890), 44 Ch. D., 205; 59 L. J., Ch., 255; 62 L. T., 108.

[2] 29 Car. II., c. 3, sec. 4.

[3] It is enough if one party signs (*Reuss* v. *Picksley* (1866), L. R., 1 Ex., 342).

oral contract for the sale of land will, upon equitable principles, be enforced[1]. Indermaur & Thwaites' Equity, 282.

As a general rule on private sales, a formal contract is drawn up by the vendor's solicitor, and duly signed, and on auction sales, a memorandum is indorsed on the printed particulars and conditions, and signed. In both cases all the essentials of contract must be found existing, and one of the essentials is the names, or other adequate descriptions, of the parties. The mere term "vendor" is not a sufficient description. Thus, suppose after an auction sale, the auctioneer signs the memorandum of agreement indorsed on the particulars and conditions of sale, merely as "agent for the vendor." There is here no contract, for the name of the vendor should have been given[2]. However, it has been held that if the auctioneer signs as "agent for the proprietor" that is sufficient, for there is here some adequate description of the person selling[3]. As regards the power of an agent to sign a contract, though he need not be authorized in writing, yet he must, in fact, have authority. A solicitor, who is merely generally acting for a client in connection with his affairs, has no implied authority to sign a contract for sale; nor has an auctioneer, who is simply instructed to look out for and find a purchaser. A house or estate agent has no power to make a contract for his employer without proof of special authority, as his duty is simply to find persons willing to become purchasers or tenants, and to submit their names and offers to his employer[4]. But where the owner of real estate instructed an agent to sell it for him at a certain

Generally a formal contract.

Potter v. *Duffield.*

Rossiter v. *Miller.*

[1] *Lester* v. *Foxcroft*, 2 Wh. & Tu., 460; Indermaur & Thwaites' Equity, 282-288.

[2] *Potter* v. *Duffield* (1874), L. R., 18 Eq., 4; 43 L. J., Ch., 472.

[3] *Rossiter* v. *Miller* (1879), L. R., 3 App. Ca., 1124; 48 L. J., Ch., 10; *Sale* v. *Lambert* (1874), L. R., 18 Eq., 1; 43 L. J., Ch., 470.

[4] *Thuman* v. *Best* (1907), 97 L. T., 239.

price, and agreed to pay the agent a specified commission on the price, it was held that the agent had power to sign a binding contract without further communicating with his principal[1]. On a sale of land by auction, however, the auctioneer, and, probably, even the auctioneer's clerk, has power to sign the contract of sale on behalf of the vendor; and the auctioneer, though not his clerk, has authority to sign on behalf of the purchaser, at the time of the sale, but not afterwards[2].

Bell v. *Balls.*

2. The effect of the contract.

A valid contract for sale and purchase being entered into, the practical effect is, subject to any stipulations to the contrary, that as between the vendor and the purchaser—subject to the vendor's duty to shew a good title, and his lien for the price, and his right to the rents and profits until the proper time for completion—the purchaser is from that moment considered as the actual owner. True, he has not yet got his conveyance, but he has a right to it, and "Equity looks on that as done which ought to be done." This maxim also produces startling results on the position of both vendor and purchaser should death of either ensue before completion.

As between vendor and purchaser.

The effect of the contract on the positions of vendor and purchaser is, that the property substantially belonging to the purchaser, any loss or deterioration arising after the contract, and before the conveyance, falls upon the purchaser[3]. Fortuitous circumstances happen which cause a great increase in the value of the property, and the purchaser is the gainer, whilst, on the other hand, if the property falls in value, the loss is the purchaser's. It is

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[1] *Rosenbaum* v. *Bilson* (1900), 2 Ch., 267; 69 L. J., Ch., 569; 82 L. T., 658.

[2] *Bell* v. *Balls* (1897), 1 Ch., 663; 66 L. J., Ch., 397; 76 L. T., 254; 45 W. R., 378.

[3] 1 Prideaux, 59, 60; Williams' Vendor and Purchaser, 439-442.

important here to notice the position should the property, consisting of houses, be destroyed by fire before actual completion, for here the loss falls on the purchaser, he having the whole risk in connection with the property from the time of signing the contract. It follows, therefore, that a person who has agreed to purchase house property should forthwith proceed to insure it, a matter which is very commonly neglected in practice. Most probably, no doubt, the property is already insured by the vendor, but it must be borne in mind that this is a personal contract between the vendor and the insurance company, and that the purchaser has no right whatever to call for the benefit of the vendor's insurance should the premises be burnt down[1]. The insurance really becomes useless, for the vendor will, anyhow, get paid by the purchaser, and, therefore, as the contract of fire insurance is only a contract of indemnity, he cannot recover from the insurance office should a fire take place. In one case in which a fire took place after a contract to sell had been entered into, and the insurance company, not knowing of the sale, paid over the insurance money to the vendor, it was held that they could afterwards recover it back as money paid under a mistake of fact[2].

Fire.

Rayner v. *Preston.*

Castellain v. *Preston.*

A course commonly adopted, in practice, in connection with this matter of insurance, is for the purchaser's solicitor to write to the vendor's solicitor, asking if the property is insured, and whether, if that is the case, his client may have the benefit of the insurance on paying a proportionate part of the current premium on completion, a suggestion which is usually assented to. Sometimes, very carelessly,

Course adopted in practice as to insurance

[1] *Rayner* v. *Preston* (1881), 18 Ch. D., 1; 50 L. J., Ch., 47: 44 L. T., 787.

[2] *Castellain* v. *Preston* (1883), 11 Q. B. D., 380; 52 L. J., Q. B., 366; 49 L. T., 29.

this inquiry is only made in the requisitions on title. Whatever the result may be after the suggestion is assented to, it is clear that, until then, the purchaser who has not insured is absolutely without protection. But let us look at what is the position if it is assented to, and in doing this we must notice that the insurance company are not parties to this amicable arrangement, which cannot, therefore, give any right to the purchaser to directly sue the insurance company[1]. The position appears to be that the vendor substantially becomes the insurer, and that should a fire occur before completion, he cannot recover his purchase money from the purchaser, who is, therefore, in a safe position. That does not alter the fact that primarily the vendor is indemnified by his purchaser, for he only loses his right to recover by reason of the arrangement he has chosen to make as regards the insurance, for the sake of saving himself a portion of the current insurance premium which he has paid.

Doubts on the position.

It must, therefore, be considered as doubtful whether, should a fire occur, the vendor can recover from the insurance office. Theoretically, therefore, a vendor ought not to make such an arrangement, but in practice it is done continually, and probably no respectable insurance company would refuse to pay under such circumstances, and thus raise the point. Further, we can only say that, though the purchaser is safe in this practical course, the vendor's safety is not so clear. However, if the vendor will consent to indorse a memorandum of the interest of the purchaser on the policy, and this is accepted by the insurance company, and duly entered by them in their books, then the purchaser will have a direct

[1] The policy is a contract to indemnify the assured personally or his representatives in law, but not his assigns otherwise than by will.

right against the insurance company, for he is thus, practically, made a party to the contract with the insurance company.

14 Geo. III. c. 78, sec. 83

It may, however, possibly be considered that a purchaser may incidentally get the benefit of his vendor's policy of insurance, by reason of the provisions of 14 Geo. III., c. 78, sec. 83, which enacts that where property which is insured is destroyed by fire, the insurance company must, upon the request "of any person or persons interested," cause the insurance money to be laid out in rebuilding or reinstating the premises. It is, however, very doubtful whether a purchaser is a "person interested" within the meaning of this statute, and it is utterly unsafe to place any reliance upon it[1].

The effect of the contract on the individual positions of vendor and purchaser.

The effect of a contract to sell, and to purchase, as regards the individual positions of the vendor and the purchaser, quite apart from their rights as against each other, is also very important. The contract has the effect of bringing about a constructive conversion, and, from the moment of the signing of the contract, the vendor's land is deemed changed into money in his hands, and the purchaser's money is deemed changed into land in his hands. The doctrine of constructive conversion is one appertaining more particularly to a study of Equity[2] than to practical conveyancing, but the point must not altogether be passed over here.

Indermaur & Thwaites' Equity, Part III., Chap. III.

Conversion.

If a person possessed of freehold property agrees to sell it, from that moment he is deemed the owner of the price, and, on the other hand, if a person agrees

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[1] See *Westminster Fire Office* v. *Glasgow Provident Society* (1888), 13 App. Ca., 699, 714, 716; 59 L. T., 641; and Williams' Vendor and Purchaser, 444, 445.

[2] See Indermaur & Thwaites' Equity, Part III., Chap. III.

to purchase freehold property, from that moment he is deemed to be possessed of the land. The position may be illustrated thus : Suppose A possessed of a freehold estate devises it to B ; he then agrees to sell it for £5000 and dies before completion of the purchase, but without altering his will. B will get nothing, but the purchase money will go to A's residuary legatee, or if there is no residuary legatee, to A's next-of-kin. The reasoning is plain—had the estate been actually conveyed away B could have got nothing, and "Equity looks upon that as done which ought to be done." The contract to sell, in fact, revokes the prior devise to B. Again, suppose A agrees to purchase freehold land, and dies before it is conveyed to him, yet the land will go to his residuary devisee or his heir, as the case may be, and formerly such residuary devisee, or heir, would have been entitled to have had the purchase money paid out of A's general personal estate. However, here the law has been altered, and now the devisee[1], or heir[2], as the case may be, takes the property subject to the payment of the purchase money, or the balance thereof if a deposit has been paid.

Notice to treat.

A notice to treat given to the owner of land by a railway company, or other public body having compulsory powers to purchase, is not sufficiently a contract to operate as a conversion of the land into money. The notice to treat merely binds the public body giving it to take the land, and prevents the landowner from selling it to anyone else; the essential element of the price is wanting, and this prevents it being a contract in any proper sense. When, however, subsequently the price is fixed, whether by arrangement, arbitration, or by a jury, then there is

[1] 30 & 31 Vict., c. 69.
[2] 40 & 41 Vict., c. 34.

a complete contract, and conversion takes place[1]. When a public body, having power to take land compulsorily, gives a notice to treat, but fails within a reasonable time to proceed under it, the landowner may apply to the Court for a mandamus to compel such public body to proceed[2].

3. The details of th contract.

We have seen that there must ordinarily be a contract in writing for the sale and purchase of land, and that the contract may be one of a private nature, or it may be one on a sale by public auction. We have now to consider the details of the contract. There may be a simple open contract, whereby one person agrees to sell, and another to buy. This often is the case in sales by private arrangement, where the parties do not at first seek professional assistance, and we often find an open contract made out by letters passing between the parties. In a sale of land by auction, professional assistance is invariably obtained, and in many cases this is also so, and proper conditions are framed, even as regards private sales. The best way of dealing with the matter is to take the case of a contract containing proper and usual conditions, and consider that, discussing and contrasting, as we proceed, the position where there is merely a simple open contract. It is impossible here to give various precedents of private contracts and conditions of sale at an auction, but it will be advisable to take, at any rate, the substance of one ordinary precedent, and work upon that. We propose to give, briefly, the ordinary conditions in the case of a sale of land by auction, for the majority of these conditions must also be included in a contract for a private sale. The particulars and conditions of sale at an auction are printed together, and at the

[1] Indermaur & Thwaites' Equity, 382.
[2] Dart, 1018.

back there is a memorandum to be signed after the sale, which embodies the particulars and conditions, and together with them constitutes the contract. We will not give the detailed language of each condition, but only the substance, so far as is necessary to arrive at a proper understanding.

onditions
sale on
uction.

Conditions of Sale[1].

1. The highest bidder to be the purchaser. No bidding to be retracted. The sale will be subject to a reserved price and to a right for the vendor to bid.

2. Purchaser to pay a deposit, and sign the contract.

3. Balance of the purchase money to be paid and the purchase completed, on a certain day, at the office of the vendor's solicitor; and, if not then completed, purchaser to pay interest from that date until completion. Purchaser to be let into possession or receipt of the profits from day fixed for completion, all outgoings up to that day being cleared by vendor. Provision for apportionment of all current rents and outgoings.

4. Provision as to the commencement of the title, and any special stipulations which may, under the circumstances, be necessary or advisable. If it is leasehold property, a statement that the lease, or a copy thereof, will be produced at the time of the sale, and may also be inspected before the day of sale.

5. The purchaser shall not require any evidence of the identity of the property other than that which is afforded by a comparison of the description in the particulars and documents of title respectively.

6. The property is sold subject to all existing tenancies and easements.

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[1] 1 Prideaux, 152 *et seq.*; 1 K. & E., 256 *et seq.*; Encyclopædia of Forms, Vol. XII., 99, 154, 275.

7. If the description of the property prove incorrect, it shall not annul the sale, nor shall any compensation be claimed on account thereof.

8. Requisitions on title to be sent to vendor's solicitor within a certain time, and if not so sent all objections and requisitions to be deemed to be waived. If any requisition be made which the vendor is unable or unwilling to comply with, the vendor shall be at liberty, notwithstanding any intermediate negotiations, or attempts to remove or comply with the same, by notice in writing to the purchaser, to rescind the sale, in which case the purchaser shall receive back his deposit and return the abstract, but shall have no claim for interest, costs, or otherwise.

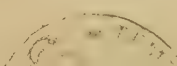
9. Provision as to unstamped deeds.

10. Provision for due execution of conveyance, which is to be prepared by the purchaser and sent to vendor's solicitor by a stated day.

11. Provision for forfeiture of deposit should the purchaser fail to comply with the conditions, and that the vendor may then re-sell the property, and any deficiency, with all expenses, to be paid by the defaulter.

Other specia conditions.

Other conditions may be necessary in particular circumstances, *e.g.*, for timber on the estate to be paid for at a valuation; for the purchaser to pay for fixtures at a valuation; with regard to buildings on the property; or for the apportionment of rent where the property is leasehold, and is held with other property under a common rent. However, the above may be taken as a fair sample of conditions of sale. Should it not be an auction sale, but a sale by private contract, the clauses in the contract, after the agreement to sell and to purchase, will be substantially the same, except that clause 1 will be omitted. The contract or conditions need not, therefore, be by any means lengthy, and



at the present day they are considerably briefer than was formerly the case, in consequence of the provisions of the Vendor and Purchaser Act 1874 and the Conveyancing Act 1881, which have, in various particulars, rendered it unnecessary to insert express stipulations which before then commonly had to be inserted. It is well to look, in particular, at the Conveyancing Act 1881, and see how that has affected the subject of contracts and conditions of sale.

Conveyancing Act 1881, sec. 3.

The object of section 3 of the Conveyancing Act 1881 was to shorten and simplify contracts for sale, and in reading it we see throughout that certain matters which formerly would, under particular circumstances, have been provided for in the contract, need not now be mentioned. Thus the Act of 1881 (enlarging the provision of the Vendor and Purchaser Act 1874) enacts, unless the contract otherwise provides: that a purchaser of leaseholds shall have no right to call for the title to the leasehold reversion; that a purchaser of enfranchised copyholds shall have no right to call for the lord's title to make the enfranchisement; that a purchaser shall not be entitled to call for any documents or information prior to the date fixed for commencement of the title[1]; that the purchaser shall assume, unless the contrary appears, that recitals of documents dated prior to the date fixed for the commencement of the title are correct; that the purchaser of leasehold property shall assume the lease was duly granted, and that the receipt for the last payment of rent due shall be sufficient evidence,

[1] This does not prevent the purchaser objecting to the title shewn under the contract, *e.g.*, when it discloses incumbrances created before the commencement of the title and irremoveable without other persons' consents (*Phillips* v. *Caldcleugh* (1869), L. R., 4 Q. B., 159; 38 L. J., Q. B., 68; *Nottingham Patent Brick and Tile Company* v. *Butler* (1886), 16 Q. B. D., 778; 55 L. J., Q. B., 280; 54 L. T., 244).

unless the contrary appears[1], that all the covenants have been performed up to the date of the completion of his purchase; that the expense of the production of deeds and documents not in the vendor's possession shall be borne by the purchaser; that a purchaser of two or more lots held under the same title shall not be entitled to separate abstracts, except at his own expense.

Having set out what is substantially a precedent of a contract or conditions of sale of land, we will now discuss the different conditions, referring to them by their numbers, in the order in which we have given them.

Condition 1. Highest bidder, etc.

The provision that the highest bidder shall be the purchaser imports an agreement that a proper contract shall be signed to duly constitute him the purchaser. If property is at an auction knocked down to a purchaser, and the vendor, or the auctioneer, then refuses to sign the contract, it is clear that there is no contract for the sale of land that can be sued on, because there is nothing in signed writing as required by section 4 of the Statute of Frauds. An action may, however, be brought against the vendor for damages for not signing the contract[2]. The provision that no bidding shall be retracted is of doubtful utility. It is clear that if there is no condition to that effect, anyone who has bid can withdraw his offer before the property is knocked down to him, and it is very doubtful whether he cannot still do so notwithstanding the condition. But whether there is a condition or not, it is sub-

Johnstone v. *Boyes*.

[1] *Re Highett & Bird's Contract* (1903), 1 Ch., 287; 72 L. J., Ch., 220; 87 L. T., 697. Having regard to this case, it seems desirable for the vendor to insert in the contract a special condition that the production of this receipt shall be conclusive evidence.

[2] *Johnstone* v. *Boyes* (1899), 2 Ch., 73; 68 L. J., Ch., 425; 80 L. T., 488; 47 W. R., 417.

mitted that if once the property is knocked down, the purchaser cannot withdraw, and the auctioneer can bind him by signing the contract if he does not sign it[1]. The provision as regards reserve and the right of the vendor to bid is important, for without it any reserve, or any bidding by or on behalf of the vendor, might invalidate the sale under the Sale of Land by Auction Act 1867[2].

Reserve price.

McManus v. *Fortescue*.

If there is a condition that the sale is subject to a reserve price, and the auctioneer by mistake knocks the lot down to a bid which is below such reserve, there is no remedy against either the vendor or the auctioneer, for the fall of the hammer is only a public acceptance by the vendor's agent of a bid which is an offer conditional on the reserve price having been reached[3]. An auctioneer's advertisement that a sale of certain property will take place at a stated place and time does not bind the auctioneer to sell, or even to put up the property, or to indemnify persons who were put to expense to attend[4]. But the advertisement of a sale without reserve does give a right to damages if the property is put up and the highest *bonâ fide* bid is not accepted[5].

Condition 2. Deposit.

It is usual to have a deposit whether a sale is by auction or by private contract. On private contract sales, whether the deposit is paid to the auctioneer, or the solicitor, he receives it as agent for the vendor,

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[1] *Payne* v. *Carr* (1789), 3 T. R., 148; *Day* v. *Wells* (1861), 30 Beav., 220; and see per Stirling, J., in *Bell* v. *Balls* (1897), 66 L. J., Ch. D., at p. 402.

[2] 30 & 31 Vict., c. 48. See also a similar provision as to sale of goods, 56 & 57 Vict., c. 71, sec. 28.

[3] *McManus* v. *Fortescue* (1907), 2 K. B., 1; 76 L. J., K. B., 393; 96 L. T., 444.

[4] *Harris* v. *Nickerson* (1873), L. R., 8 Q. B., 286; 42 L. J., Q. B., 171.

[5] *Warlow* v. *Harrison* (1859), 1 E. & E., 309; 29 L. J., Q. B., 14; *Mainprice* v. *Westley* (1865), 34 L. J., Q. B., 229; 6 B. & S., 420; *Johnstone* v. *Boyes* (1899), 2 Ch., 73; 68 L. J., Ch., 425.

who is entitled to at once demand payment over of the amount; it is, in fact, the same thing as paying the deposit to the vendor himself; and as this is not satisfactory, looked at in the interests of the purchaser, it is proper to specially provide that the party receiving the deposit receives it as stakeholder. On auction sales the deposit is usually, and in London invariably, paid to the auctioneer, but in the country it is not infrequently paid to the vendor's solicitor. There is in such cases this difference, that the solicitor (unless expressly stated to be a stakeholder) receives it as agent for the vendor, and must, if required, pay it over forthwith to the vendor, and if the purchase goes off the purchaser cannot sue the solicitor for the amount, but only the vendor[1]; but the auctioneer receives the deposit as a stakeholder for both parties, and must not part with it until completion. Not being an agent he will not be accountable for any profit he may make from the use of the money[2], and if the purchase goes off the purchaser may sue him for its recovery. However, if an auctioneer who has received a deposit becomes bankrupt, and the purchase is in due course completed, the vendor has to bear the loss of the deposit[3].

Payment to solicitor or auctioneer.

In sales under the order of the Chancery Division of the High Court of Justice, an auctioneer has to give security for a deposit if above £200, and he has, immediately after the sale, to pay the amount into Court.

Sales by Court.

The first part of condition 3, viz., as regards the place of completion, is often of no importance at all, but sometimes it is, and to avoid any possible

Condition 3. Completion of purchase, etc.

[1] *Ellis* v. *Goulton* (1893), 1 Q. B., 350; 62 L. J., Q. B., 232; 68 L. T., 144; 41 W. R., 411.
[2] *Harrington* v. *Hoggart* (1830), 1 B. & Ad., 577.
[3] 1 Prideaux, 55.

question its insertion is always advisable, for it plainly states the place of completion, and prevents any possible dispute. If no such condition is inserted, although in the majority of cases no dispute will arise, yet possibly it may be otherwise. Thus a vendor who lives in London, sells a house situate in London, and instructs a Birmingham solicitor to act for him, who desires that the completion shall take place at his office in Birmingham, but the purchaser and his solicitor, being in London, object to complete at Birmingham. If there is the special condition stating that the purchase shall be completed at the office of the vendor's solicitor, which is also stated to be at Birmingham, this concludes the matter, and the purchase must be completed there, but if there is no such special condition, this is not the case. The general rule is that it is the duty of the purchaser to follow the deeds and complete where they are, but that cannot be said to at all satisfactorily settle the point. It is submitted that the true rule is to be found by analogy to the rule as to the place at which a vendor is entitled to produce the deeds for examination with the abstract[1], and that in the absence of express condition the vendor is only entitled to require the purchase to be completed either (1) in London, or (2) at or near his residence, or (3) at or near the property sold, and if he requires it to be completed elsewhere the extra costs occasioned to the purchaser must be borne by him. It is so rarely that any practical difficulty occurs on this point that there seems to be no direct authority upon it.

Interest on purchase money.

If a contract merely provides for completion at a certain date, but does not provide what consequences are to ensue if the purchase is not completed by

[1] Post, p. 336.

that date, though the purchaser is entitled to all rents and profits from the day fixed for completion, yet he has to pay interest on the balance of his purchase money at the rate of £4 per cent. per annum from the day fixed for completion—or from the first subsequent date at which a good title is shewn, or at which he took possession[1]—until actual completion. He may, however, if no fault whatever attaches to him as regards the delay, escape liability to thus pay interest, by paying the balance of his purchase money into a bank, on deposit, and giving notice to the vendor that he has done so, in which case the vendor will only get such interest as is allowed by the bank on the money on deposit.

Condition to pay interest.

If the property is sold under a special condition that interest shall be paid, if from any cause whatever the purchase is not punctually completed, the interest may be fixed at a higher rate than £4 per cent. per annum, and the purchaser cannot escape liability to pay interest by depositing his money in a bank and giving notice, even though he is free from fault[2]. He has entered into a special contract, and must abide by it. But if he can shew that the delay is not merely caused by defects in the vendor's title, or by the negligence of the vendor or his solicitor, but is caused by the vexatious conduct, bad faith, or gross negligence of the vendor, he is not liable to pay interest, for to make him pay interest in such a case would be to enable the vendor to perpetrate a hardship, and it might even amount to a fraud, upon the purchaser[3]. Here, therefore, for the sake of justice, the strict terms of the contract are departed from. If there is a special condition to pay interest

Riley to Streatfield.

[1] 1 Prideaux, 50, 51.
[2] *Riley to Streatfield* (1886), 34 Ch. D., 386; 56 L. J., Ch., 442; 55 L. T., 48.
[3] Ibid.

Wilful default.

where delay in completion arises from any cause but the "wilful default" of the vendor, it must be shewn the delay is due to the vendor not doing what was reasonable on the facts of the case, and with knowledge that the omission would cause delay and would make it impossible to complete by the day named[1].

Taking rents instead of interest.

It is very usual now, particularly in the case of weekly property, to find this condition as to the consequence of non-completion framed in an alternative manner, viz., that, if not completed, the purchaser shall pay interest at a certain rate, or that it shall be in the option of the vendor to take the rents until actual completion, he paying outgoings to the same time. A vendor will frequently find the rents more advantageous to him than the interest, and the condition framed in this way is, sometimes, more likely to ensure a punctual completion.

Day for completion.

The condition provides for completion on a certain date. If no day were fixed, on the principles already explained as to the effect of contract[2], the purchaser would be entitled to the rents and profits from the date of the contract, though the vendor as against that would get interest at £4 per cent. per annum on the purchase money. As it is, under the condition, these rights only accrue from the day fixed for completion. If no date is fixed, the rule is that the purchaser must complete within a reasonable time; when a day is fixed, then he should complete by that

[1] See *Re Young & Harston's Contract* (1886), 31 Ch. D., 168; 54 L. J., Ch., 1144; 53 L. T., 837, where the vendor went abroad two days before date for completion; *Re Hetling & Merton's Contract* (1893), 3 Ch., 269; 62 L. J., Ch., 783; 69 L. T., 266, where vendor relied on insufficient power of attorney from a mortgagee abroad; *Re Strafford & Maple's Contract* (1896), 1 Ch., 235, where vendor did not procure concurrence of necessary parties; *Jones* v. *Gardiner* (1902), 1 Ch., 191; 71 L. J., Ch., 93; 80 L. T., 74; *Bennett* v. *Stone* (1903), 1 Ch., 509; 72 L. J., Ch., 240; 88 L. T., 35.

[2] Ante, p. 294.

day, though it does not at all follow that he does. The actual observance of the day named is only of importance in so far that, it not being observed, there is a liability to pay interest; but it is possible that a condition may go so far as to stipulate that completion by the given date is to be deemed a matter of the essence of the contract, and such a provision is binding. And although time was not originally of the essence of the contract, it may be made so by a reasonable notice after the proper day, or the reasonable time, has gone by, but care must be taken that a really reasonable time is given. Further, the property may be of such a nature that it is evident time was meant to be of the essence of the contract, *e.g.*, very short leaseholds, or a public-house. Where time is of the essence of the contract, either by reason of original stipulation, reasonable notice, or because of the nature of the property, then if there is a failure to complete the purchaser has no further rights, and his deposit is forfeited. This position must be borne in mind in considering the 11th condition, providing for forfeiture of deposit should the purchaser not comply with the conditions.

The final portion of the condition we are considering, viz., for the apportionment of rents and outgoings, does not appear to be of any practical importance, as in its absence all necessary apportionments would have to be made. In the case of a contract without any date fixed for completion, these apportionments must be made as at the date of the contract, and where a day is fixed for completion, as from that date. Where a magistrate's order has been made to do certain works on the property sold, the expenses are an outgoing which attaches at the date of the order[1]; but where a notice to do certain

[1] *Tubbs* v. *Wynne* (1897), 1 Q. B., 74; 66 L. J., Q. B., 116.

work is served by the local authority—*e.g.*, under the Private Street Works Act 1892[1], or the Public Health Act 1875[2]—before completion and the work is done by the authority on default of the owner and is finished after completion, the expense is not an outgoing until the work is finished, and falls on the purchaser.

Condition 4. Stipulations as to title, etc.

We have seen in the last chapter what title a vendor will have to shew a purchaser in the absence of any contrary stipulation. The primary object of condition 4 is to provide what shall be the root of title, and to make any special stipulations which may be necessary or advisable under the circumstances. There may be all sorts of points in respect of which requisitions might be made by a purchaser, if he is not prevented by express stipulation, and both trouble and expense may be saved by special conditions, which, however, should in themselves only be reasonable, as otherwise intending purchasers may be frightened from bidding. As regards fixing upon a root of title, sufficient has already been said in the last chapter, but we may here conveniently look at a few instances in which it may be necessary to insert special provisions as to title. Suppose that A is selling as heir-at-law to his father, whose death cannot be strictly proved, he having perished in a shipwreck; here it would be proper to plainly state the facts, and provide that the purchaser shall, on a statutory declaration of those facts, assume the death, and shall not require any further or other evidence. Suppose again that there had some years ago been existing a mortgage on the property which can be clearly shewn to have been paid off, but no re-conveyance was made, and it is

[1] *Stock* v. *Meakin* (1900), 1 Ch., 683; 69 L. J., Ch., 401; 82 L. T., 248.

[2] *Re Allen & Driscoll's Contract* (1904), 2 Ch., 226; 73 L. J., Ch., 614; 90 L. T., 637.

difficult to now trace the mortgagee, and get in the legal estate; a provision might be inserted that the purchaser shall not require the legal estate to be got in. If, however, more than 13 years have elapsed since the mortgage was paid off, no such special condition would be necessary[1]. Or suppose that the property is leasehold, and there is outstanding the last day, or last few days, of the term, in the absence of a stipulation to the contrary the purchaser would be entitled to have this got in at the expense of the vendor, though getting it in would be of no real good to him. This might be a difficult, and perhaps even an impossible matter, and it would be proper to prevent such a requisition being made. These examples will suffice to shew how much may be done by proper and reasonable provisions being made with regard to the title.

Statement that lease may be inspected.

The last part of this condition only applies where the property is leasehold, and then it is of much importance. It provides that the lease, or a copy thereof, will be produced at the time of the sale, and may also be inspected for a reasonable time before the day of sale. The object is that any purchaser shall be charged with notice of the contents of the lease, for if he purchases without such notice, and the lease contains any covenants or conditions which are not strictly usual, he will be entitled to repudiate his purchase altogether and to refuse to complete[2]. If the lease contains no unusual or onerous covenant or condition, there is no necessity for this clause; but, as a rule, it does contain something that is technically not strictly "usual," and it is safest always to state that the lease may be thus inspected. If this is not done, but any unusual or onerous

Re White & Smith's Contract.

[1] *Sands to Thompson* (1883), 22 Ch. D., 614; 52 L. J., Ch., 406; 48 L. T., 210; and see ante, pp. 216, 217.

[2] *Reeve* v. *Berridge* (1888), 20 Q. B. D., 523; 57 L. J., Q. B., 265; *Re White & Smith's Contract* (1896), 1 Ch., 637; 65 L. J., Ch., 481.

covenants are clearly stated, this will equally answer the purpose, though the condition in the shape given is the best course of procedure. The law here is based on the principle that a purchaser is entitled to see exactly what he is buying, and that, in the absence of any statement to the contrary, he has a right to assume that there is nothing whatever of an unusual character about the property. So, also, if it is freehold property, but it is subject to building or other restrictions, this must be brought to the purchaser's knowledge. If freeholds are contracted to be sold and it is afterwards discovered that they are subject to restrictive covenants as to building and user, of which the vendor was not aware at the date of the contract, the purchaser can rescind, but cannot get specific performance with compensation, for the property is substantially different to what was contracted for, and it would be extremely difficult to assess compensation, and a hardship on the innocent vendor[1].

Selling an underlease.

If the property, being leasehold, is held not under an original lease, but under a sub-lease, this must be stated, either in this condition, or somewhere on the face of the contract. A purchaser of leaseholds has a right to assume that it is a lease direct from the freeholder, unless the contrary is stated, and to simply describe the property as leasehold, and to say that the title shall commence with the lease under which it is held by the vendor, is misleading; for, firstly, the covenants in the sub-lease and the original lease may differ, and, secondly, even if they are identical, the purchaser would find himself exposed to claims both by the immediate and the superior landlord[2]. Also if the property which is being sold

[1] *Rudd* v. *Lascelles* (1900), 1 Ch., 815; 69 L. J., Ch., 396; 82 L. T., 256.

[2] *Darlington* v. *Hamilton* (1854), Kay, 550; 23 L. J., Ch., 1000.

Selling part property h under one lease.

is part of other property comprised in one lease, which reserves one common rent for the whole of the property, or contains a condition of re-entry as regards the whole of the property on breach of covenants relating to any part of it, it must be made to clearly appear in some way on the face of the contract that this is so; and the matter is best dealt with in this condition, by stating the fact, and providing that no objection shall be taken by reason of it. In such a case it will be observed that a purchaser might find himself liable to ejectment by reason of breach of covenants on the part of the person in whom the other portion of the property was vested, however faithfully he might perform the covenants as regards the part of the property he purchased, and manifestly, therefore, the position ought to be brought to his knowledge, so that he may judge whether he cares to purchase and run the possible future risk. If there is such a condition as has been mentioned, no objection can, of course, afterwards be made by the purchaser[1]. If, however, though several houses are comprised in one lease, a separate rent is reserved in respect of each, and the condition of re-entry is made only to apply on breach of covenants as regards each house, then there is no need to make any special statement, or condition, upon the point, for the position is practically the same as if there were separate leases.

The theory of the two points dealt with in the previous paragraph is, that a purchaser must not be misled by what, though technically a correct description, is not practically a full and sufficient one. Thus, to take another illustration of the principle—suppose A has enfranchised his copyhold property, but the right to the minerals is still in the lord, as is

[1] *Patterson* v. *Long* (1844), 6 Beav., 590.

elling nfranchised opyholds.

ordinarily the case on an enfranchisement; here technically it is correct to describe the property as freehold, but this is not legally sufficient, and the purchaser will be entitled to rescind unless the vendor can make a title to the minerals[1]. The proper course is for the vendor, in some way, to shew that the right to mines and minerals is not in him; but he can do this sufficiently by merely describing the property as "enfranchised copyholds," without any special condition, as the very fact of so describing them gives a purchaser notice that possibly the right to the minerals is still in the lord. Again, if land is sold as "suitable for building purposes" that may be true enough, but if there exists something which prevents building, a purchaser cannot be bound to complete. Thus, where property was so described, and it was a disused burial ground, and therefore incapable of being built on for general purposes, it was held that the contract would not be enforced against the purchaser[2].

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imits of onditions s to title.

Manifestly this condition is one of the greatest importance, and requires the practitioner, before framing it, to thoroughly consider his client's title. If he does so, he may by this condition preclude a purchaser from raising points which might be fatal, or at any rate might cause inconvenience and expense. Still, no condition can protect a vendor who is guilty of fraud; and if a vendor knows that the property is subject to an easement, or restrictive covenant, or other outstanding interest, or burden, derogating from the absolute ownership, he is bound to disclose it, and cannot shelter himself under a condition making the title begin at a date subsequent to that of the instrument creating the easement, or restrictive

[1] *Upperton* v. *Nicholson* (1871), 6 Ch. App., 436; 40 L. J., Ch., 401.
[2] *Re Trustees of St. Saviour's Rectory & Oyler* (1886), 31 Ch. D., 412; 55 L. J., Ch., 269; 54 L. T., 9.

covenant, or under a condition which would be sufficiently comprehensive to cover the particular matter if the purchaser knew it to exist[1]. Further, it must be noticed that when a special condition provides that no objection shall be made to a certain part of the title, but the purchaser discovers that there is a defect, even though he cannot shew that the vendor knew of it, the vendor cannot enforce specific performance, but in such a case, as there is no fraud on the vendor's part, the purchaser will have to lose any deposit he has paid[2]. It will be remembered that the Conveyancing Act 1881[3] provides that a purchaser shall not require the production of documents or inquire into matters antecedent to the proper commencement of the title, but the principle just stated equally applies here, for the Act simply makes a statutory instead of an express condition[4]. As regards any defect of title, however, known to the vendor, he may always preclude a purchaser raising any objection with regard to it by expressly stating the defect on the face of the contract, and stipulating that no objection shall be made with regard to it[5].

Re Scott & Alvarez.

Re Williams & Parry.

It does not at all follow that condition 5, with regard to the identity of the property, is necessary, for it may be that the property sold is clearly capable of being identified as the property mentioned in the various muniments of title; but it is usual to insert

Condition 5. Identity.

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[1] *Heywood* v. *Mallalieu* (1884), 25 Ch. D., 357; 53 L. J., Ch., 492; 49 L. T., 658; *Nottingham Patent Brick & Tile Co.* v. *Butler* (1886), 16 Q. B. D., 778; 55 L. J., Q. B., 280; 54 L. T., 244.

[2] *Re Scott & Alvarez* (1895), 2 Ch., 603; 64 L. J., Ch., 821; 73 L. T., 43; 43 W. R., 455. See also *Best* v. *Hammond* (1879), 12 Ch. D., 1; *Re Davis & Cavey* (1889), 40 Ch. D., 601; *Re National Provincial Bank & Marsh* (1895), 1 Ch., 190; for further illustrations that the purchaser cannot recover his deposit from a vendor who has made a special contract, although Equity refuses specific performance, as the recovery of the deposit depends on Common Law rules as to whether the vendor has broken the special contract.

[3] 44 & 45 Vict., c. 41, sec. 3 (3).

[4] *Jones* v. *Watts* (1890), 43 Ch. D., 574; 62 L. T., 471; 38 W. R., 725.

[5] *Re Williams & Parry* (1895), 72 L. T., 869.

it, and, as it is a common form condition, there is no reason why it should not be inserted, as it can do no harm, and may possibly do good. It is clear that no good title is made out unless it is shewn that the documents offered as the muniments of title relate to the property sold. In some cases great changes have taken place, and it may be difficult to see that the property, as it now exists, is the same as that described in the deeds. Thus, what is in the deeds described merely as arable land may now be land with houses on it; or the name of a road, or the numbers of the houses in that road, may have been changed. The condition sometimes provides that no evidence of identity shall be required other than what is afforded by a comparison of the descriptions in the particulars and the documents of title respectively; but it sometimes goes on to say that the purchaser may also have at his own expense a statutory declaration that the property has been held consistently with the title shewn by the abstract for the last 12 years, or perhaps a longer period. The effect of the condition is not, however, to compel a purchaser to take property which he cannot possibly identify as being the property comprised in the muniments of title, for the condition, in fact, implies that the deeds do shew the identity, and if they do not, then no good title is made out. All the condition seems to do is to preclude the purchaser from calling for any other evidence, and if he is not satisfied with the evidence he is entitled to, and that evidence does not, in fact, shew identity, though he can call for nothing else, yet he cannot be compelled to complete[1].

Condition 6. Tenancies and easements.

The 6th condition may or may not be necessary or advisable. If there are no tenancies it would, of

[1] *Curling* v. *Austen* (1862), 2 Dr. & Sm., 129.

course, be absurd to provide that the property is sold subject to existing tenancies, but if the property is let, then this condition is essential, as without a statement to the contrary the property would be taken to be sold with possession, and the purchaser would be entitled to refuse to complete, or at any rate to receive compensation[1]. As to easements, if the vendor knows there are none affecting the property, there is strictly no occasion to provide that the property is sold subject to easements, and indeed the condition may, in a sense, then be regarded as unnecessarily depreciatory. Still, unless the vendor is absolutely certain on the point, it is best to insert the condition, which is so much in the nature of common form that it is not likely to do any harm; and it must be borne in mind that should there turn out to be any easement affecting the property, derogating from the absolute ownership, and the purchaser did not at the time of his purchase know of it, he will be entitled either to refuse to complete, or else at any rate to receive compensation, unless the condition has been inserted[2]. If an easement is known by the vendor to exist, he must disclose it, and he cannot protect himself by the general condition that the property is sold subject to all easements[3]. However, as regards some patent or obvious easement, a vendor is not bound to disclose that, *e.g.*, a public right of way, or a right of light to adjoining buildings[4], for these are things that a purchaser can manifestly find out for himself.

Condition 7 Misdescription.

It is needless to say that a vendor should accurately describe the property which he is selling, and the 7th condition is meant to provide for the possibility

[1] *Hughes* v. *Jones* (1861), 3 De G., F. & J., 307; 31 L. J., Ch., 83.
[2] *Ellis* v. *Rogers* (1885), 29 Ch. D., 661; 53 L. T., 377.
[3] *Heywood* v. *Mallalieu* (1884), 25 Ch. D., 357; 53 L. J., Ch., 492; 49 L. T., 658.
[4] *Oldfield* v. *Round* (1800), 5 Ves., 508.

of inadvertent misdescription. We have put this condition in its most usual form, which precludes a purchaser from claiming any compensation for misdescription. Another way in which the condition is sometimes framed is, to provide that no objection shall be made, or compensation claimed, on account of small errors, but that if any other errors shall be discovered before completion, such as in the absence of condition would entitle either party to relief, compensation shall be allowed, to be settled by arbitration. As a rule, the first-mentioned condition is the one inserted; but if a considerable quantity of land is being sold, perhaps the latter is preferable, and it will be observed that it may operate, possibly, for the benefit of the vendor. Before considering the effect of the condition, whichever form it may take, it will be best to look at the position if there is no such condition.

Position under open contract.

If the misdescription is known to the vendor, it of course amounts to fraud, and entitles the purchaser to repudiate the contract altogether, *e.g.*, if a vendor describes his property as containing 40 acres, when he knows that it contains only 38 acres[1]. If the vendor is unaware of the misdescription, but it is material and substantial, being of such a nature that the purchaser will not get substantially what he contracted for, then the position is the same, and the purchaser may repudiate the contract[2], or may, if he prefers, take the property with compensation for the misdescription, such compensation consisting of a fair abatement of his purchase money[3]. Thus, suppose A contracts to sell to B 100 acres of land, to which he believes he is entitled, but as a fact he can only make a title to about half, here the

Flight v. *Booth*.

[1] See Dart, 146-155.
[2] *Flight* v. *Booth* (1834), 1 Bing., N. C., 370.
[3] *Burrow* v. *Scammell* (1882), 19 Ch. D., 175; 51 L. J., Ch., 296; 45 L. T., 606.

purchaser is entitled to repudiate the contract, for the misdescription is material and substantial. The misdescription, however, need not necessarily refer to quantity, but it may refer to the quality or nature of the property. Thus, in *Flight* v. *Booth*, the plaintiff had contracted to purchase leasehold premises, and it was merely stated in the particulars that the lease provided that no offensive trade should be carried on on the premises. As a fact, the lease prohibited many trades which could not properly be styled offensive, and the purchaser was held entitled to refuse to complete. Also where a property sold as a free public-house proved to be tied for beer[1]. And where property is agreed to be sold as of one tenure, and it turns out to be of another, this is fatal to a vendor's right to compel the purchaser to complete[2]. However, on this last point it may be observed that in the case of long leasehold property, capable under the Conveyancing Acts 1881 and 1882[3] of being converted into a fee simple, the fact that it was described as freehold, when it was really leasehold, would appear to be immaterial, as the vendor can at once make it freehold.

Flight v. *Booth.*

Different tenure.

If the misdescription is not of a substantial or material nature, and the vendor did not know of it, this is not a ground on which the purchaser can repudiate the contract, though he may demand compensation for it. Thus, A agrees to sell to B 100 acres of land, believing that he has a title to the whole, but he can only make a title to 95 acres, here the purchaser can claim compensation, but he cannot refuse altogether to complete, unless indeed the five acres were so

Slight misdescription.

[1] *Jones* v. *Edney* (1812), 3 Camp., 285; 13 R. R., 803.
[2] 2 Wh. & Tu., 502; Dart, 150.
[3] 44 & 45 Vict., c. 41, sec. 65; 45 & 46 Vict., c. 39, sec. 11. It must be a term originally not less than 300 years, of which 200 years are still unexpired, without rent other than a peppercorn rent, or any condition of re-entry. It may be enlarged into a fee simple by the owner executing a deed containing a declaration of enlargement.

Scott v. *Hanson.*

situated as to be absolutely material[1]. Where 14 acres of land were sold as water meadow, but only 12 acres answered to that description, it was held that the purchaser could not repudiate the contract, but that he was entitled to compensation; but where land was described as rich water meadow, and it turned out to be imperfectly watered, it was held that the purchaser was not even entitled to compensation, as the expression was one of a merely vague and indefinite nature[2]. Similarly where a house is described as well built[3], or substantial[4], or eligible[5], or convenient, and it is in fact not so, this is no ground for repudiating the contract or claiming compensation, for the words are not really descriptive, but are only commendatory or puffing statements.

Kennard v. *Ashman.*

It is not always easy to determine whether an undoubted misdescription entitles a purchaser to repudiate, or only entitles him to compensation, and the most that can be done is to lay down a general rule, and apply it, in every case, to the particular circumstances[6]. Where property is described as regards its quantity by qualified words, *e.g.*, "or thereabouts," "more or less," or "by estimation," this may improve the vendor's position if there is only a slight misdescription of quantity, but it will not do more[7].

Compensation allowed only before completion.

A purchaser is only entitled to claim compensation before completion of his purchase, and after completion he has no further right of this nature, though

[1] *McQueen* v. *Farquhar* (1805), 11 Ves., 467.
[2] *Scott* v. *Hanson* (1835), 1 R. & My., 128; 27 R. R., 141.
[3] *Kennard* v. *Ashman* (1894), 10 T. L. R., 214.
[4] *Johnson* v. *Smart* (1860), 2 Gif., 151.
[5] *Hope* v. *Walter* (1900), 1 Ch., 258.
[6] For various examples both ways, see 1 Prideaux, 39-42. Dart gives six cases, apart from fraud, in which the purchaser may repudiate the contract, 150-159.
[7] 1 Prideaux, 38.

he may, where there is a discrepancy in quantity, have a right of action against the vendor on the covenants for title[1].

Usual condition as to misdescription.

This being the state of the law in the absence of special stipulation, we now turn to the most ordinary condition with regard to the matter, viz., that errors of misdescription shall neither annul the sale nor give a right to compensation. The superior effect of the condition is but slight. If there is any fraud, it is useless; if the misdescription is very slight, the vendor is absolutely protected; but if the misdescription is really serious, then a purchaser is entitled to refuse to complete, or at any rate to refuse to complete without compensation. He cannot, however, insist on completion with compensation, and if he presses the point the contract must fall through, and he must be repaid his deposit[2].

Re Terry & White.

Condition as to misdescription sometimes adopted.

We have referred to the other condition that is sometimes adopted as to misdescription, viz.: that no objection shall be made in respect of small errors, but beyond that compensation shall be allowed for errors discovered before completion. If this condition is used, care should be taken to limit the right to compensation to errors discovered before completion, for if this is not done, then under the words of this condition compensation might be claimed even after the conveyance has been executed[3]. Assuming, however, that the proper words are introduced into the condition, then, as on an open contract, compensation can only be claimed before completion[4].

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[1] *Clayton* v. *Leech* (1889), 41 Ch. D., 103; 61 L. T., 69; 37 W. R., 663; *Saunders* v. *Cockrill* (1902), 87 L. T., 30.

[2] *Re Terry & White's Contract* (1886), 32 Ch. D., 14; 55 L. J., Ch., 345; 54 L. T., 353; *Rudd* v. *Lascelles* (1900), 1 Ch., 815; 69 L. J., Ch., 396; 82 L. T., 256.

[3] *Palmer* v. *Johnson* (1884), 13 Q. B. D., 351; 53 L. J., Q. B., 348; 51 L. T., 211.

[4] *Clayton* v. *Leech*, supra.

Condition 8. As to requisitions and rescission.

The 8th condition, fixing the time for delivery of requisitions on, or objections to, title, by the purchaser, and giving the vendor under certain circumstances a right to rescind the contract, is a very useful one. In its absence it would never be too late for the purchaser, at any time before completion, to deliver requisitions, and there could be no such right on the vendor's part to rescind. The time named in the condition for delivery of requisitions is absolutely binding[1], subject, no doubt, to the Court's power to relieve in some cases of mistake or misapprehension. It must, however, be borne in mind that the time will only run from the delivery of a perfect abstract, and if the abstract is imperfect, and is afterwards added to or amended, the purchaser may raise objections at any time before completion[2]. To endeavour to provide for this, it is not unusual to add to the condition the words, "and for the purpose of any objection or requisition, the abstract shall be deemed perfect if it supplies the information suggesting the same, though otherwise defective." In some cases the condition provides that an abstract shall be delivered within a certain time, and then the requisitions within a certain time afterwards. This is not advisable, for if the abstract is not delivered within the prescribed time, the purchaser is not bound by the condition to deliver his requisitions within a fixed time; for the vendor, by not delivering his abstract within the proper time, is taken to have waived the stipulation as to the time for the requisition, which may accordingly be delivered within any reasonable time[3]. It is best simply to provide that the requisitions shall be delivered within a certain time from the receipt of the abstract. If

Perfect abstract.

Provision as to requisitions.

[1] *Oakden* v. *Pike* (1865), 11 Jur., N. S., 666; 34 L. J., Ch., 620.

[2] *Warde* v. *Dixon* (1859), 28 L. J., Ch., 315.

[3] *Upperton* v. *Nicholson* (1871), L. R., 6 Ch., 436; 40 L. J., Ch., 401.

a day is fixed for delivery of the abstract, it appears also that, if not duly delivered, the purchaser is entitled to refuse to carry out the contract, and even if no time is fixed but it is not delivered within a reasonable time, the position is the same[1]; but if the purchaser receives and keeps the abstract, then it is otherwise[2]. As a general rule, where a time is fixed for delivery of objections to, or requisitions on title, none can be put in after the time named, provided a proper abstract has been delivered within the time prescribed (or within a reasonable time, if none is mentioned) and the purchaser will be deemed to have waived all points not raised within the proper time. But the condition is not binding where the title is manifestly bad on its face, *e.g.*, when the vendor is a trustee for sale, and the time for selling has not yet arrived, for this goes to the very root of the title[3].

Provision for rescission.

The latter part of the condition with which we are dealing confers a right on the vendor to rescind the contract, and merely pay back the deposit, should the purchaser make any objection, or requisition, which the vendor is "unable or unwilling" to remove or comply with. The condition should be framed thus widely, so as to include not merely requisitions on title, but also on other matters, *e.g.*, a claim to compensation for misdescription. The condition should give the right to rescind if such a requisition is even made, and not merely if it is insisted on or persisted with[4], for if this latter is the case, the vendor cannot rescind if the purchaser, on being told that his requisition will not be complied with, waives it; whereas, if framed in the manner sug-

[1] *Compton* v. *Bagley* (1892), 1 Ch., 313; 61 L. J., Ch., 113; 65 L. T., 706.
[2] *Hipwell* v. *Knight* (1835), 1 Y. & C., 401.
[3] *Want* v. *Stallibras* (1873), L. R., 8 Ex., 175; 42 L. J., Ex., 108.
[4] *Mawson* v. *Fletcher* (1871), L. R., 6 Ch., 91; 40 L. J., Ch., 131.

gested, an absolute right to rescind arises directly the requisition is made, subject to what is stated in the next paragraph[1]. It is very advisable to provide that there shall be this right of rescission, notwithstanding any attempt to remove the objection or comply with the requisition, for, if this provision is not inserted, the right of rescission is waived by attempting to comply with the requisition[2]. Whilst litigation is pending, to determine whether a purchaser is entitled to persist in his requirements, the vendor can still rescind if the condition is thus properly framed, but he cannot do so after a decision in the purchaser's favour[3].

Effect of provision for rescission.

The condition for rescission does not, however place a purchaser absolutely in the power of the vendor, for the condition is construed, as far as possible, against the vendor. A vendor is not entitled to arbitrarily rescind simply because, without any good ground, he is unwilling to go on with the matter; he must act, not only without caprice, but reasonably[4]. The right of rescission can only be exercised in perfect good faith; but if to comply with the requisition will cause trouble and expense, that is a valid reason for rescinding[5]. If a vendor knew, or must be presumed to have known, that he had no good title to the property, he cannot claim the benefit of the condition, so as to escape liability, by merely returning the deposit, but he is liable for damages in the ordinary way, as if there had been no such condition[6]. But where a vendor inadvertently

[1] *Re Starr Bowkett Building Society & Sibun* (1889), 42 Ch. D., 375; 58 L. J., Ch., 651; 61 L. T., 346.
[2] *Tanner* v. *Smith* (1840), 10 Sim., 410.
[3] *Re Arbib & Class* (1891), 1 Ch., 601; 69 L. J., Ch., 263; 64 L. T., 217; 40 W. R., 90.
[4] *Quinion* v. *Horne* (1906), 1 Ch., 596; 75 L. J., Ch., 293.
[5] *Re Dames & Wood* (1885), 29 Ch. D., 626; 54 L. J., Ch., 771; 53 L. T., 177.
[6] *Bowman* v. *Hyland* (1878), 8 Ch. D., 588; 47 L. J., Ch., 581; 39 L. T., 90; *Re Jackson & Haden* (1906), 1 Ch., 412; 75 L. J., Ch., 226.

described the property as being held on lease for 99 years, and it turned out that it was held under a sub-lease, and the purchaser raised this objection, it was held that the vendor could rescind under the condition in question[1]. Where a vendor has a right to rescind he must determine promptly whether he will rescind, and must not keep the matter waiting over, *e.g.*, to see if he can find another purchaser[2]; but, as has been pointed out, if the condition is properly framed he can rescind, notwithstanding that he has first endeavoured to comply with the purchaser's requirements. Where a vendor is entitled to rescind, he is not bound in his notice to state his reasons for rescinding[3].

Re Deighton & Harris.

Finally, the condition provides for the return of the abstract in the event of rescission, and this, though not important, is, at any rate, technically proper. As to the general property in the abstract, while the contract is open, it is neither in the vendor nor in the vendee absolutely, but if the sale goes on it is the property of the vendee, and if the sale goes off it is the property of the vendor. Meantime, if there is no condition on the point, the vendee has a temporary property, and a right to keep the abstract, even if he repudiates the title, until the dispute is finally settled, in order to shew on what ground he did reject the title[4].

Return of abstract.

The 9th condition, throwing the costs of stamping deeds which are not stamped, or are insufficiently stamped, on the purchaser, is by no means one that should necessarily be inserted, though at one time

Condition 9. As to unstamped deeds.

[1] *Re Deighton & Harris* (1898), 1 Ch., 458; 67 L. J., Ch., 240; 78 L. T., 430; 46 W. R., 341.
[2] *Smith* v. *Wallace* (1895), 1 Ch., 385; 64 L. J., Ch., 240; 71 L. T., 814; 43 W. R., 539.
[3] *Re Starr Bowkett Building Society & Sibun* (1889), 42 Ch. D., 375; 58 L. J., Ch., 651; 61 L. T., 346.
[4] Sugden, 428; Dart, 315.

it was a common form condition, and no one thought of objecting to it. In its absence, if any deeds were found to be not stamped, or to be insufficiently stamped, the purchaser had a right to require that they should be properly stamped at the vendor's expense, but if the condition was inserted then he had no such right, and if he required them to be thus stamped he himself had to pay for it. The result usually was that, the condition being ordinarily inserted, if any deeds were not properly stamped they remained in that condition, and the revenue suffered accordingly. Consequently, it has been enacted that any such condition shall be void as regards deeds executed since 16th May, 1888[1]. Any such condition is, therefore, of no avail as regards deeds since the date mentioned, but it is perfectly good as regards earlier deeds, though the revenue authorities declined to stamp (without penalty) after signature a contract with this clause in it. It seems clear, however, that a general condition that the purchaser shall pay for stamping any deeds not properly stamped is bad, and that the condition, if inserted at all, should be specially limited to deeds executed before 17th May, 1888.

Stamp Act 1891.

As to deeds, etc., not registered in Middlesex or Yorkshire.

Should the property be situated in Middlesex or Yorkshire, it may also be advisable to add to this condition a clause that if any deeds or documents have not been registered, the expense of registering, if required and insisted on, shall be borne by the purchaser, and it is submitted that this condition is good although the vendor is aware that certain of the deeds or documents have not in fact been registered.

Condition 10.

The 10th condition is not very important, and it does not seem to matter whether it is inserted or not,

[1] 54 & 55 Vict., c. 39, sec. 117.

As to preparation and execution of conveyance

though it is certainly usual to insert it. Irrespective of any condition, the conveyance is prepared by, and at the expense of, the purchaser. The condition appears to owe its origin to the fact that on a contract without any special provisions it was, and is, still necessary for a vendor to tender a conveyance to a purchaser who neglects and refuses to complete, before he can sue him for specific performance or proceed to forfeit the deposit and resell. If, however, this condition as to preparation of the conveyance is inserted, then such is not the case, and even if this condition is not inserted, but a time for completion is named, it seems that there is no need to tender a conveyance. As, in practice, a time always is named for completion, the condition as to preparation of the conveyance must be deemed one only inserted as matter of common form, and to avoid any possible doubt on the point. Some very careful conveyancers go on also, in conditions of sale, to specially provide that it shall not be necessary for the vendor to tender a conveyance, but there seems to be no occasion whatever for this.

Condition 11. As to forfeiture of deposit, and reselling.

It is certainly always advisable to insert the 11th condition, for it removes any doubts and specifies clearly the position, but it is doubtful if the condition gives any, or at any rate much higher, rights than if there were no such condition. If there is no such condition and the purchaser makes default, then, if the vendor gives notice to that effect, the purchaser's deposit is at once forfeited, if time is of the essence of the contract, either by express stipulation or by reason of the nature of the property, and if this is not the case, then after reasonable notice, making time essential[1]. If the vendor forfeits the deposit, he cannot sue for specific performance[2], but he

[1] *Ex parte Barrell* (1875), L. R., 10 Ch., 512; 44 L. J., Bk., 138.
[2] *Lamond* v. *Davall* (1847), 9 Q. B., 1030.

may, if he likes, resell the property and sue for any loss on resale and the expenses of such resale, giving credit, however, for the deposit[1]. Where the condition is inserted the position appears to be exactly the same, except that, perhaps, it is not necessary for the vendor to give notice of forfeiture of the deposit. Anyhow, the condition is an absolutely common and usual one in the case of an auction sale, though, somehow, on sales by private contract it is rather the practice to omit it. It is difficult to see the reason for the distinction, or what practical objection there can be to the clause.

Building scheme.

We have now been through the whole of the ordinary clauses or conditions in a contract for the sale of land, but before concluding this chapter it may be well to refer specially to property sold under a building scheme, as the matter is one which so frequently occurs in practice. The owner of an estate wishes to sell it, or a part of it, in plots for the purpose of building, and desires that there shall be special stipulations as to the class of buildings that may be erected, and many other details in connection therewith. It is evident that it is very desirable that in such a case there should be proper and reasonable building regulations, both in the direct interests of the vendor, and also in the interests of the various purchasers, for if the various plots are sold free from any restrictions, each particular purchaser will be able to build just as he chooses, and this might prove seriously detrimental to the value of the property. The vendor may be retaining a part of the estate himself or may have adjoining property, and even if he is disposing of the whole property, and has none adjacent, he is more likely to get a better price for the various plots if there are reasonable restrictions than would be the case if he sold

[1] *Ockenden* v. *Henly* (1858), 27 L. J., Q. B., 361.

without any, for then many persons would hesitate to purchase, and build good houses, not knowing what kind of erections might be put up by the owners of any of the other plots. It is most essential, therefore, when land is sold in different lots for the purposes of building, that some scheme should be resorted to whereby different purchasers, and the vendor himself as regards unsold plots, are mutually restricted, and in such a way that not only may the vendor bring an action in the case of infringement, but also that each individual purchaser may proceed against any other purchaser, or against the vendor, as regards any unsold plots.

Difficulties in connection with the matter.

It is, of course, easy enough for a vendor of land sold for building purposes to provide, by condition, that certain restrictive covenants shall be inserted in the conveyances, but then primarily such covenants could only be sued upon by the vendor with whom they were entered into, and, further, the rule of law is that the burden of covenants (whether affirmative or negative) entered into by the owner of land, other than leasehold[1], do not run with the land, but only bind the original covenantor[2]. Negative covenants in a conveyance restricting the right of the purchaser to use the land purchased may be entered into: (1) simply for the personal benefit of the vendor, or (2) for the benefit of the vendor as owner of other property, or (3) as part of a building scheme for the mutual benefit of the owners of all lots. The first class of covenants are usually found when the vendor is selling all his property in the district to one person, and are purely personal between the vendor and purchaser[3], and are not in any way

[1] As to covenants in leases running with the land, see post, p. 380.
[2] *Austerberry* v. *Oldham Corporation* (1885), 29 Ch. D., 750; 53 L. T., 543.
[3] *Osborne* v. *Bradley* (1903), 2 Ch., 446; 73 L. J., Ch., 49; 89 L. T., 11.

enforceable by the vendor's personal representatives or assigns or against a sub-purchaser[1]. The second class of covenants are found when expressly so stated in the conveyance, or when the vendor retains some property in the locality and there is no evidence of a contrary intention; the benefit of this second class runs with every part of the other property for the benefit of which it was created, even if the vendor was only a mortgagor, and passes to a purchaser who did not even know of it[2]. The third class of covenants can be so arranged that the owner for the time being of each lot can enforce them. The question of whether contemporaneous or subsequent purchasers of parts of a building estate are entitled to enforce such covenants against other purchasers depends on the intention to be gathered from all the circumstances[3] in each case, as to whether the restrictions are imposed merely for the benefit and protection of the vendor himself, or for the common benefit of the purchasers[4]. Nothing, therefore, should be left to a doubtful intention, but that intention should be clearly specified.

Rule in *Tulk* v. *Moxhay*.

As regards the point that only the original covenantor is at Law bound, though that is true, yet in Equity the rule has long been that if the covenants are not of the first class above named (solely for the personal benefit of the covenantee) and are simply restrictive or negative in their character so as to restrict the use and enjoyment of the land, they create an equity which runs with the land and can

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[1] *Formby* v. *Barker* (1903), 2 Ch., 539; 72 L. J., Ch., 716; 89 L. T., 249.

[2] *Rogers* v. *Hosegood* (1900), 2 Ch., 388; 69 L. J., Ch., 652; 83 L. T., 186.

[3] *Elliston* v. *Reacher* (1908), 2 Ch., 665; 78 L. J., Ch., 87; 99 L. T., 701.

[4] 1 Key & Elphinstone, 301; *Nottingham Patent Brick Co.* v. *Butler* (1886), 16 Q. B. D., 778; 55 L. J., Q. B., 280; 54 L. T., 444.

be enforced, by injunction only, against everyone who takes the land, except a purchaser for value who has got the legal estate without actual or constructive notice[1]. And this rule in *Tulk* v. *Moxhay* is not confined to persons deriving title under the covenantor, but extends to a squatter acquiring a title by adverse possession under the Statutes of Limitation[2]. Any subsequent purchaser who takes with notice of such restrictive covenants is also bound by them[1]. It is therefore manifest that a building scheme can be so devised as to put persons under restrictions which can be taken advantage of, both by the original covenantees and by other persons interested.

Special conditions as to building.

Where, therefore, land is sold in lots for building purposes, certain special conditions must be framed, which may appropriately commence as follows:—"The several lots are sold, and will be conveyed, subject to the following conditions and stipulations for the benefit of the property sold [and the adjoining estate of the vendor], and the present and future owners, lessees, and tenants from time to time of such property [and estate][3]."

There is no need to detail the special conditions that then follow, for they vary in each particular case, but the following may be mentioned as instances: That no house of less cost than £—— shall be erected on any lot purchased; that no shops, but only private dwelling-houses, shall be erected; that no lot or any part thereof, not built on, shall be used otherwise than for a garden or pleasure ground. Then there should be a condition providing that, as

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[1] *Tulk* v. *Moxhay* (1848), 2 Phil., 774; *Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D., 403; 51 L. J., Q. B., 73. This rule only applies to negative, and not to affirmative, covenants.

[2] *Re Nisbet & Potts* (1906), 1 Ch., 406; 75 L. J., Ch., 238; 54 W. R., 286; 94 L. T., 297.

[3] 1 Key & Elphinstone, 316.

regards any unsold lots, the vendor shall stand in the position of a purchaser[1], and that each purchaser shall, by the deed of conveyance, covenant to the same effect as in the conditions, and so that the burden of the covenant shall, as far as is possible, pass to each successive owner, but that every owner is only to be personally liable so long as he remains owner of the land. Under conditions thus framed, followed by conveyances containing covenants as mentioned, these restrictive provisions will be mutually enforceable in Equity by and against all persons who come in as purchasers under the scheme, and this though the property is not all sold at the sale but disposed of subsequently; and they will also be binding on subsequent alienees, who take with notice, as they practically must do if the covenants are inserted in the conveyances, which might not be the case if there were no such covenants, but the conditions only were relied on[2]. This seems to be perfectly satisfactory, and the most direct and best course to pursue. Another plan, often resorted to, is to provide in the conditions that each purchaser shall, as he completes, execute a common deed containing the restrictive covenants, and that a memorandum thereof shall be indorsed on each purchaser's conveyance[3], but the only superiority of this plan, if indeed there is any, appears to be that the vendor will always have in his possession the original deed containing the covenants.

Effect of such conditions.

Execution of common deed.

In the case of such a building scheme, it being for the general benefit of all parties concerned, the vendor, although the direct covenantee, will be quite unable to release or modify any of the restrictions,

Vendor unable to release parties from restrictions.

[1] But even without this he would be bound (*Re Birmingham, etc., Land Co. & Allday* (1893), 1 Ch., 342; 62 L. J., Ch., 90).

[2] *Whatman* v. *Gibson* (1838), 9 Sim., 196. See 1 Prideaux, 131, 132.

[3] 1 Prideaux, 132, 425, 427.

unless a condition is inserted enabling him to do so[1]. This may sometimes be advisable, but not as a general rule.

It will be observed that the liability on these restrictive covenants, as between each original purchaser and the vendor, depends upon contract, but as regards subsequent purchasers and the vendor, and one purchaser as against the other or as against the vendor, it depends on principles of Equity. It has been decided that the perpetuity rule does not apply to prevent the full and continued force of such covenants[2].

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[1] *Western* v. *McDermott* (1866), L. R., 1 Eq., 497; 36 L. J., Ch., 78; *Spicer* v. *Martin* (1888), 14 App. Ca., 12; 58 L. J., Ch., 309; 60 L. T., 546.

[2] *L. & S. W. Ry. Co.* v. *Gomm* (1882), 20 Ch. D., 562; 51 L. J., Ch., 530; 46 L. T., 449; *Mackenzie* v. *Childers* (1889), 43 Ch. D., 265; 59 L. J., Ch., 188; and see ante, p. 110.

CHAPTER XI.

INVESTIGATION OF TITLE.

In the last chapter the acts, and interests, of the vendor have been mainly considered, and we have seen how he should protect himself in selling, by means of various conditions and stipulations, so that he shall not be put to undue and unnecessary expense and trouble by the purchaser. We have now to look at the matter in the purchaser's light, and consider the various points as they present themselves to him.

Purchaser generally content to buy under an open contract.

In the first place, it may be observed that, as a rule, a purchaser can never want anything better than to purchase under an open contract, for he then is in no way hampered in considering the title; he has a right to the full period of title allowed by the law, and he is entitled to have every point arising on it cleared up by the vendor. His rights are certainly, to some extent, modified by the provisions of the Vendor and Purchaser Act 1874 and the Conveyancing Act 1881, sec. 3[1]. But, even now, his position is better than when he purchases under a contract containing special provisions, subject only to this, that on an open contract for the purchase of leaseholds, he may, perhaps, get a very short title, and having reference to that fact, and to the possible consequences[2], it may be here advisable, even if the vendor is willing to sell under an open contract, that the purchaser should stipulate for a special contract giving him a longer period of title than he could

[1] See ante, p. 302.

[2] See ante, pp. 273, 274, and *Patman* v. *Harland* (17 Ch. D., 353) there quoted.

otherwise demand. If a purchaser buys under an open contract, he has simply to consider what he is by law entitled to, and to act accordingly, subject, if he is a willing purchaser, to any points that he may feel inclined to waive. If, however, he buys under a contract containing special conditions and stipulations, then he has to consider how far his rights are controlled, and to what extent he must in consequence modify his investigation and requirements. No person should agree to buy land under a special contract without first perusing the contract, and considering the conditions under which it is being sold; and a prudent purchaser will consult his solicitor on the matter, who should go through the proposed contract, particularly considering what special stipulations are proposed with regard to the title to be shewn, and advise his client whether he can safely buy under it. It may be that the conditions are so stringent, and disclose, or at any rate suggest, such difficulties in connection with the title, that he may well advise his client not to have anything to do with the property. If it is an auction sale, of course, that disposes of the matter, if the client follows his solicitor's advice; but if it is a private contract on which the solicitor is being consulted, it will be his duty to revise and discuss it with the vendor's solicitor, and endeavour to get it modified in a proper way, and perhaps, to some extent, even to look into the title. Whether the sale is by public auction or private contract, if inspection is offered of any leases or deeds containing restrictive covenants, it will be most advisable, and generally important, to inspect these before allowing the client to sign the contract, bearing in mind that there having been an opportunity of inspection, this will amount to notice of the contents of the documents in question[1].

Perusing the contract.

[1] See hereon, ante, p. 311, and *Reeve* v. *Berridge*, and *Re White & Smith's Contract*, there quoted.

Obtaining abstract.

Taking it now that a contract for sale and purchase is entered into, whether it is an open or a special contract, the next thing is for the purchaser's solicitor to write the vendor, or his solicitor, asking for delivery of the abstract. When the abstract is delivered, the purchaser's solicitor should then write for an appointment to examine the deeds with the abstract, if an appointment has not been given when the abstract was sent, and in the meantime it is advisable to go lightly through it to see the nature of the title. The next thing is to attend and examine the abstract, for which purpose the solicitor and a clerk should attend, so that one may take the abstract and read from that whilst the other checks it with the deeds. Before, however, considering the actual examination of the abstract, it is necessary to look at the position with regard to the place at which the deeds are to be produced for examination and the costs of their production.

Where deeds to be produced, and costs of production.

The rule is that deeds in the vendor's possession must be produced for the purpose of examination with the abstract, either (1) in London, (2) on or at some place adjacent to the property, or (3) at or near the vendor's residence[1]. If the vendor proposes to produce the deeds at some other place, and this would occasion extra costs to the purchaser, these extra costs must be borne by the vendor. This is, however, subject to any stipulation to the contrary in the contract, but no such stipulation as regards production is commonly made, and, practically, it is but seldom that any question arises in connection with the point, because it will nearly always be found that the vendor's solicitor, at whose office the deeds are usually proposed to be produced, is a solicitor whose place of business is either in

[1] Sugden, 429, 430.

London, or near to the property, or near to the vendor's residence. Still, possibly, this may not be the case. A vendor who resides at Bath may be selling a house situate in York, and a solicitor practising at Exeter may be acting for him; he could not compel the purchaser's solicitor, at his client's expense, to go to Exeter to see the deeds, but some convenient arrangement must be made, or else he must produce the deeds either at Bath, York, or London, or pay the extra costs of their production at Exeter.

Deeds, etc., not in vendor's possession.

Before the Conveyancing Act 1881 the same rule prevailed as regards deeds and other documents of title not in the vendor's possession, and, further, all costs of obtaining their production had to be borne by the vendor. Thus, a vendor often has not all the deeds in his possession, but he has a right to compel their production under a covenant for production, or an acknowledgment of the right to production, and then the party in whose possession they are is entitled to be paid his costs of producing them. The fact that, in the absence of stipulation to the contrary, the vendor had to pay the costs of obtaining production, led to a common form condition for the purpose of throwing these costs upon the purchaser; but no such condition is now necessary, as the Conveyancing Act 1881[1] provides that the expenses of the production and inspection of all muniments or documents of title of every description which are not in the vendor's possession, and the expenses of all journeys therefor, and of procuring all certificates, declarations, evidences, and information not in the vendor's possession, and generally of everything necessary for verifying the abstract, outside what is in the vendor's possession, shall be borne by the purchaser. As already pointed out[2], this enactment

[1] 44 & 45 Vict., c. 41, sec. 3 (6).
[2] See ante, pp. 282, 283, and *Re Johnson & Tustin* there quoted.

does not relieve the vendor from the duty of furnishing, at his own expense, a proper and complete abstract of title, wherever the deeds and other documents of title may be; but beyond this the provision is most comprehensive. It applies even as regards the production of the very root of title itself, so that where on the sale of leasehold property the original lease was missing, it was held that the purchaser must pay the costs of enquiries to ascertain its whereabouts, and of obtaining its production[1]. And where a mortgagor was selling property, it was held that the purchaser must pay the costs of the mortgagee's solicitor for producing the deeds[2]. So also it appears, from the case just quoted, that if a mortgagor is selling property, and the same solicitor is acting for the mortgagee, he is entitled to be paid for producing the deeds, because they are in his possession not in the capacity of solicitor for the vendor, but as solicitor for the mortgagee. It is submitted, however, that as a matter of proper practice, a solicitor under such circumstances ought not to insist on the charge, except in so far as any extra costs may be occasioned, *e.g.*, if the deeds are not in his possession, but in the possession of his client, the mortgagee, and he has to attend on his client and obtain them.

Re Stuart, Olivant & Seadon's Contract.

Re Willett & Argenti.

The examination of the abstract.

The abstract, as has been pointed out[3], contains an epitome, or statement, of all dealings with the property since the period at which the title commences. It may contain epitomes of deeds, wills, leases, entries on court rolls in the case of copyholds, statements as to marriages, deaths, and many other matters. The object of examining the abstract with

[1] *Re Stuart, Olivant & Seadon's Contract* (1896), 2 Ch., 328; 65 L. J., Ch., 576; 74 L. T., 450; 44 W. R., 610.
[2] *Re Willett & Argenti* (1889), 60 L. T., 735.
[3] Ante, p. 281.

the original muniments of title is to check the accuracy of the abstract, and if necessary to correct and amplify it, and, further, to see that the various documents are in themselves perfect. At the examination the various original deeds, probates of wills, letters of administration, certificates, and other documents are produced. The property may be sold free from land tax, and the evidence to be produced to verify the abstract on this point is the certificate of the contract for redemption, with the receipt for the consideration money[1]. The abstract may contain a statement as to a person's death intestate, and the proper evidence to verify this is the production of the letters of administration, or, if it is a partial intestacy, the production of the probate of the will, which will shew that the particular property did not pass under it. As to the legal title to copyholds, the abstract is verified by the production of the steward's copies of the court rolls. Statements as to births, deaths, and marriages are verified by the production of certificates, and possibly also by statutory declarations, or, in default, various other matters may be offered in verification, *e.g.*, entries in family bibles. The acknowledgment of a deed by a married woman under the Fines & Recoveries Act 1833 is proved: (*a*) if before 1883, by an office copy of the certificate of acknowledgment[2], (*b*) if since 1882, by a memorandum purporting to be signed by one commissioner[3]. If the title depends on a private Act of Parliament, a King's printer's copy of the Act is the proper verification of the abstract. In all cases, however, if what is necessary for the verification of the abstract is not in the vendor's

Land tax.

Intestacy.

Copyholds.

Births, death and marriages.

Private Acts of Parliament.

[1] By 59 & 60 Vict., c. 28, sec. 32, land tax may be redeemed on payment of 30 times the last assessment. Apportionment of land tax prior to redemption can be got under sections 35 or 36 of the Land Tax Redemption Act 1802.

[2] *Jolly* v. *Handcock* (1852), 7 Ex., 820; 22 L. J., Ex., 38.

[3] 45 & 46 Vict., c. 39, sec. 7.

possession, it must be borne in mind that the purchaser will have to pay the costs of obtaining it.

Procedure on examination of deeds, etc.

The first thing on examining a deed is to look at the stamp with which it is impressed, and make a note of it on the abstract for the purpose of presently seeing if it is the proper stamp. If registration was necessary, as in the case of property in Middlesex or Yorkshire, it should be noticed whether the document has indorsed on it a memorandum of the fact of the registration. Care should be taken to see that all deeds are properly executed and attested, particularly as regards deeds executed under powers of appointment[1]. Every deed should be carefully inspected to see if there is any note or memorandum indorsed on it—*e.g.*, a memorandum as to some dealing with the property, or of some restriction as to user, etc.—and also whether there are any memoranda, or notices, annexed to, or with the deeds. The abstract should then be carefully compared with the various deeds and documents, and special care taken in the examination of the parcels and as regards any matters that appear to be of particular importance; and, whenever necessary, corrections and additions should be made to the abstract. The practitioner is not, when examining the abstract, supposed to be critically considering the title, but rather seeing that the abstract is a true and correct abstract; the real consideration of the title will follow afterwards, but it is very advisable, before examining the abstract with the deeds, etc., to have, at any rate, some primary notion of the title, as that will, probably, much facilitate the examination. On

[1] Two witnesses are, however, always sufficient, it being so provided as to wills by 1 Vict., c. 26, sec. 10, and as to deeds by 22 & 23 Vict., c. 35, sec. 12. And see hereon, *Re Price, Tomlin* v. *Latter* (1900), 1 Ch., 442; 69 L. J., Ch., 226; 82 L. T., 79; *Barretto* v. *Young* (1900), 2 Ch., 339; 69 L. J., Ch., 605; 83 L. T., 154; *Poney* v. *Hordern* (1900), 1 Ch., 492; 69 L. J., Ch., 231; 82 L. T., 51.

the examination, it is customary and proper to make a note in the margin of the abstract of the fact of the production of the deed, or other muniment of title, produced in verification, together with the date and place of production.

Requisitions.

The abstract having been duly examined with the muniments of title, the next thing is for the practitioner to consider the title, and to prepare and deliver his requisitions on, and objections to title. A good title is shewn on the face of the abstract if it appears that the vendor can himself convey, or compel others to convey, whatever interest in the property forms the subject of the contract; but not otherwise. Thus, where the vendor sold as trustee for sale, but the abstract disclosed that the trust did not arise until X, the present tenant for life, died, it was held that the purchaser could refuse to complete and was not bound to accept a conveyance from X under the Settled Land Acts[1]. And an objection that the abstract does not shew a title on its face may be taken after the time limited for sending in requisitions[2]. It will be remembered that the contract usually fixes a time for the delivery of requisitions, and that this time must, where the abstract shews a title according with the contract, be strictly adhered to[3], and it is, therefore, advisable, directly the abstract is delivered, to indorse on it the date of its delivery, which date should also be entered up in the solicitor's diary. It may possibly happen that the purchaser's solicitor may not be able to get an immediate inspection of all the muniments of title, through some of them not being in the vendor's possession, and he may, therefore, have to prepare

Re Bryant & Barningham.

[1] *Re Bryant & Barningham's Contract* (1890), 44 Ch. D., 218; 59 L. J., Ch., 636; 63 L. T., 20.
[2] *Want* v. *Stallibrass* (1873), L. R., 8 Ex., 173; 42 L. J., Ex., 108.
[3] Ante, p. 322.

and deliver his requisitions before he has completed his examination of the abstract, unless, indeed, he can obtain from the vendor's solicitor an extension of his time for delivery of requisitions. If the title is a complicated one, or it is a large purchase, it is very usual for the solicitor to send the abstract to a conveyancing counsel to peruse it and advise on the title, and settle the requisitions. Whether the requisitions are prepared by the solicitor, or by counsel, they are signed and delivered by the solicitor. These requisitions should go into every point on the title on which there is the slightest doubt, and should put before the vendor's solicitor every matter on which evidence is required, or information wanted, the object being that the purchaser's solicitor shall be thoroughly convinced of the soundness of the title, and be informed on all points on which information is necessary or advisable; for it must be remembered that the client will very likely soon, in his turn, be selling or mortgaging the property, when similar requisitions may be put by or on behalf of his purchaser or mortgagee. It is, therefore, best to put every point in the requisitions on which any inquiry can reasonably be made. We sometimes, therefore, see rather lengthy requisitions, with not very much in them.

Common form requisitions.

It is proposed now to enumerate some of the most ordinary common form requisitions which are put in, irrespective of direct points of title[1]:—

1. *Is any land tax, sewers rate, or tithe rent-charge payable in respect of the property? If redeemed, the certificate of redemption should be produced and handed over on completion.* It is generally advisable to put this point so as to have a definite statement from the vendor's solicitor, of the nature

[1] These common form requisitions are mainly taken from Dickins' Requisitions on Title.

of the burdens upon the land, if indeed there are any.

2. *Have all the roads and footpaths abutting on the property been taken over by the local authority? Evidence should be furnished that all charges for making, repairing, and draining the same have been fully satisfied.* This is a very proper and useful requisition in the case of new house property, but otherwise it is of no practical utility. The point is that, until all the roads and footpaths have been adopted by the local authority, all expenses of making, keeping in repair, and draining the same, must be borne by the owners of the adjoining property.

3. *Are there any rights of way, water, or other easements affecting the property, and not disclosed by the abstract or particulars?* This is certainly an advisable question, whether there is, or is not, in the contract a special condition that the property is sold subject to easements. If there is no such special condition, then the existence of an easement may constitute an objection to the title, and even if there is a special condition which protects the vendor it is well that the purchaser should be informed of the true position[1].

4. *What deeds and documents will be handed over to the purchaser on completion?* The position as to the right to retain deeds has been explained[2]. The purchaser's solicitor may be able to practically see what deeds will, and what will not, be handed over, but there can be no objection to the inquiry, and it may be the vendor does not intend to rely on his strict right to retain certain deeds.

5. *All outgoings up to the date of completion must be paid by the vendor, and the last receipt for the same*

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[1] As to the position when the property is subject to easements, see ante, p. 317.

[2] See as to this, ante, p. 267.

produced, and all proper apportionments be made. There is no good in this requisition, but it is commonly inserted, and, at any rate, serves to remind the vendor's solicitor to be ready on this point, though he ought not to need any reminder.

6. *Which of the boundary walls to the premises are party walls?* This is a very proper requisition in the case of a purchase of house property which is not detached, if the deeds do not give the information, so that the purchaser may ascertain the mutual rights and liabilities attaching to the use and occupation of the walls.

7. *Are the premises insured? Give particulars of the insurance. Will the vendor hold the policy for the benefit of the purchaser, he paying on completion a proportionate part of the current premium*[1]*?* If the property sold is freehold, and is let under a lease requiring the lessee to insure, the proper requisition instead of the foregoing is: "*Evidence should be given that the premises are insured by the lessee in accordance with the covenant in the lease, and the last premium paid.*" This is a most reasonable and proper inquiry, and the vendor, under the covenants in the lease, can easily ascertain the point and give a definite answer with which the purchaser may be satisfied, without actually requiring the policy to be produced to him.

8. *Is the vendor aware of any breach by the lessee of any of the covenants contained in the lease? If so, what steps (if any) have been taken to remedy the same?* This is a proper inquiry where the purchaser is buying property subject to a lease existing thereon. Should it turn out that there has been a breach of covenant, the purchaser should insist on its being remedied, or he should claim compensation in respect of it. If the property is leasehold, it is not unusual

[1] See as to this, ante, p. 295.

to inquire whether all covenants in the lease under which the property is held have been performed; though the Conveyancing Act 1881[1] makes the last receipt for rent sufficient proof of the performance of all covenants up to completion, unless the contrary appears[2].

9. *Have any parochial or other notices been served upon the vendor, or the tenant, or property, and which have not been complied with?* This is an important requisition in the case of a purchase of house property, and particularly weekly property, for such notices are continually being served by local authorities, and the obligation is one which affects and binds the property.

10. *Have any notices to repair been served, or any claims in respect of repairs been made, by the superior landlord as to the premises, or the party walls, sewers, or drains thereto, and which remain uncomplied with or unsatisfied?* This is an advisable and proper requisition in the case of a purchase of leasehold house property, for, in addition to ordinary repairing covenants, there is often a covenant to pay a reasonable share of the expenses of repairing, supporting, and maintaining drains, sewers, and party walls.

11. *When were the premises last painted both inside and outside?* This is a proper requisition to insert if the purchase is of leasehold house property, when the lease contains, as it invariably does, a covenant to paint at certain specific periods, so that the purchaser may know when such obligation will next attach to him.

12. *To whom is the ground rent now payable? Please supply full names and addresses.* This is a convenient requisition if the purchase is of leasehold

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[1] 44 & 45 Vict., c. 41, sec. 3 (4), (5).

[2] *Re Highett & Bird's Contract* (1903), 1 Ch., 287; 72 L. J., Ch., 220; 87 L. T., 697. Sometimes a special condition of sale makes this receipt conclusive evidence.

property, for the ground landlord may be a different person altogether from the person who appears on the abstract as originally the ground landlord, and the answer may save trouble.

13. *Full particulars should be given of the customs obtaining in the manor relating to descent, freebench, fines, heriots, and any other customary services.* This is a reasonable and proper condition if the purchase is of copyhold property, as everything there depends on custom, and it is most desirable to obtain all information on the subject by the answer to this requisition, and the correctness of that answer can afterwards be verified by inquiry of the steward.

14. *Evidence should be given that the necessary licence from the lord of the manor to the granting of the lease mentioned in the abstract was duly obtained, or, if not required, evidence of the custom dispensing therewith should be supplied.* This is proper in the case of the purchase of copyhold land where there are any tenancies which exceed one year, for a copyholder cannot create a tenancy for more than a year, without licence, or a custom justifying him in so doing.

Re Ford & Hill.

It was formerly usual to put a requisition asking whether the vendor or his solicitor was aware of any incumbrance, or other defect of title, not disclosed by the abstract. But it has been decided that no answer can be demanded to this requisition[1], and it is now usually omitted. If, however, the sale is of an equity of redemption, it is conceived the purchaser can properly ask and compel an answer to a question if the vendor has created or has knowledge of any equitable charge on the property which is not disclosed by the abstract, because the purchaser is

[1] *Re Ford & Hill* (1879), 10 Ch. D., 365; 40 L. T., 41; 48 L. J., Ch., 327.

not to get any legal estate which will protect him against unknown equities.

Special requisitions.

Having thus given specimens of ordinary common form requisitions of a practical nature, which, according to circumstances, may properly be put, we will next proceed to a consideration of special requisitions rendered necessary according to the title as disclosed by the abstract. In doing this, it is only attempted to deal with some of the points most likely to occur, or which appear to be of the greatest practical importance[1].

Voluntary settlements.

The abstract of title may perhaps shew that the root of title[2] is a voluntary settlement. If this is so, and the contract stipulated that the title should begin with this deed, and it is less than 40 years old, and the contract did not state that this deed was a voluntary settlement, then this is in itself a good ground for objecting to proceed further with the purchase, as unless otherwise stated the purchaser is entitled to assume that the specified root of title is a conveyance for value[3]. If, however, it has been so stated, no doubt the contract will be found to contain a stipulation that no objection shall be made upon that score, and, if that is so, it is no good to put a requisition on the point, whatever independent inquiry may be considered advisable. But, apart from that, some deed occurring in the title may be a voluntary settlement, and a requisition may very properly be put with regard to it, for we have seen

Re Marsh & Earl Granville.

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[1] For fuller information in connection with special requisitions, the reader is referred to Jackson & Gosset's Investigation of Title. The various points on which it may be necessary to make special requisitions are there arranged in alphabetical order, so that it is a book specially suitable for reference. Due acknowledgment is here made for the assistance derived from that work in the compilation of the following remarks on special requisitions.

[2] See ante, p. 279.

[3] See ante, p. 279, and *Re Marsh & Earl Granville* there quoted.

the doubts which beset a title gained through a voluntary settlement[1]. In such a case, though it is not necessary to make an inquiry in the requisitions as to the settlor's position at the time, so as to shew that the settlement was not a fraud upon creditors under 13 Eliz., c. 5 (because a *bonâ fide* purchaser is under the statute protected), yet it is proper to call for evidence that no bankruptcy ensued before the property was sold by the settlee, for it must be remembered that a voluntary settlement is void if bankruptcy ensues within two years, and even after two years, but within ten years, unless it can be shewn that the settlor was solvent at the time, and that the property in the settlement passed to the trustee thereof at the time of its execution[2]. The requisition need only be where bankruptcy of the settlor ensued before the person on whom the property was settled effected a sale of it, for it has been decided that if bankruptcy occurs after the property is sold the enactment does not entitle the trustee in bankruptcy to follow the property into the hands of the purchaser, but only entitles himself to follow the proceeds of sale[3]. Further, if the voluntary settlement was before the Voluntary Conveyances Act 1893[4], then, because of 27 Eliz., c. 4, a requisition should be put requiring the vendor to shew that the settlor did not subsequently convey the land away to a purchaser for value, before the voluntary settlee sold the property. If the voluntary settlement is since 1893, no requisition upon that point is necessary.

Bankruptcy Act 1883.

Re Carter & Kenderdine.

Deeds executed under power of attorney.

It may appear that some deed has been executed, not by the conveying party himself, but by someone acting for him under a power of attorney. At

[1] Ante, p. 279.
[2] 46 & 47 Vict., c. 52, sec. 47. See also, post, pp. 510, 511.
[3] *Re Carter & Kenderdine* (1897), 1 Ch., 776; 66 L. J., Ch., 408; 76 L. T., 476; 45 W. R., 484.
[4] 56 & 57 Vict., c. 21 (29th June, 1893). See post, p. 510.

Common Law a power of attorney was, unless given for valuable consideration, liable to be revoked by the act of the donor, or by his bankruptcy, or lunacy, or, in the case of a female, by her marriage, and it was also revoked by the death of the donor, whether given for valuable consideration or not. But a power coupled with an interest—*i.e.*, one given by deed or for valuable consideration for the purpose of effectuating some security, or of protecting or securing some interest of the attorney—was not revocable in any of these ways, even at Common Law[1]. Thus a power of attorney given by a debtor to his creditor, to sell certain land and discharge the debt out of the proceeds, has always been irrevocable[2]. And now, the Conveyancing Act 1881[3] provides that any person making or doing any act in good faith after 1881 in pursuance of a power of attorney shall be safe, provided he had no notice of the previous death, lunacy, bankruptcy, or revocation of the donor of the power. It is, however, somewhat doubtful whether this enactment does more than protect the attorney himself[4]. The Conveyancing Act 1882[5] further provides that a power of attorney created by an instrument executed since 1882—(*a*) if given for value, may contain a clause rendering it absolutely irrevocable, and (*b*) whether given for value or not, may contain a clause rendering it irrevocable for a stated period not exceeding one year; and in either of these cases a purchaser[6] shall be safe, although he has notice of any circumstance which, but for the

Conveyancing Act 1881, sec. 47.

Conveyancing Act 1882, secs. 8, 9.

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[1] See cases in 11 Encyclopædia of Laws of England, 541.

[2] *Gaussen* v. *Morton* (1830), 10 B. & C., 731; *Gurnell* v. *Gardner* (1863), 4 Gif., 626.

[3] 44 & 45 Vict., c. 41, sec. 47.

[4] See the marginal note to the section, which reads: "Payment by attorney," etc. Certainly a marginal note is not part of a statute (*Claydon* v. *Green* (1868), L. R., 3 C. P., 511), but the doubt is perceptible.

[5] 45 & 46 Vict., c. 39, secs. 8, 9.

[6] This includes a lessee, mortgagee, or other person who for value takes or deals with property, 45 & 46 Vict., c. 39, sec. 1.

clause in the power, would have effected a revocation. Bearing in mind what the Common Law was as to revocation, and that the enactment in the Conveyancing Act 1881 cannot safely be relied on by a purchaser if any instrument of at all recent date has been executed under a power given before 1st January, 1883, a requisition should be put requiring the vendor to shew that nothing happened to revoke the power before the deed in question was executed. If, however, the deed was executed under a power expressed to be irrevocable and given by instrument made since 1882, and provided also that the deed was executed within the prescribed time, then no requisition on the point is necessary. If, however, the power of attorney has not been abstracted, or a copy furnished, this should be called for, so that it may be perused and the point ascertained whether it is expressed to be irrevocable.

Wills and intestacies.

Various requisitions may, according to circumstances, be necessary when the title to property devolves by reason of death. In the first place, as regards wills, a requisition may be put in requiring it to be shewn that a certain testator died possessed of the property which, according to the abstract, passed under his will. Then the abstract may shew a will, the subsequent marriage of the testator, and then his death; and, as marriage ordinarily revokes a will[1], a requisition is essential pointing out that the will appears to have been revoked by the marriage, and asking whether it was revived by a codicil executed after the marriage, and, if so, calling for an abstract of such codicil. Again, the vendor may, according to the abstract, be claiming as heir-at-law to a devisee under a will, and the date of the death of such devisee may not appear; bearing in

[1] See post, p. 574.

mind that if he died before the testator a lapse would have occurred[1], an inquiry on this point will be necessary. As regards intestacies, it may be necessary to put in a requisition making various inquiries as to certificates of marriage, birth, and death, and perhaps even asking for a pedigree to be furnished. In all cases of devolution on death, inquiry must be made with regard to the payment of the various death duties[2]; and in particular for a certificate under section 11 of the Finance Act 1894 that the full estate duty has been paid[3]. It may also be necessary to make inquiries in connection with curtesy and dower. Thus, as regards curtesy, suppose that the abstract shews that at a comparatively recent date Mrs. Smith, a married woman (now dead intestate), was the owner of the property, the proper requisition will be: "Did Mrs. Smith at any time have issue by her husband, born alive, and capable of inheriting? If so, either the death of her husband must be proved, or, if he is still alive, he must join for the purpose of releasing his estate by the curtesy."

Death duties.

Curtesy and dower.

If in any will forming part of the abstract it should appear that the testator has charged the property being sold with payment of certain annuities, legacies, or specified debts, an inquiry will be necessary on the point of whether the annuitants are still living, and, if not, for the dates and proofs of their deaths, and also for evidence of the payment of the legacies, or specified debts, thus charged on the estate.

Charges of legacies, etc.

Special requisitions may be necessary in connection with the disability a married woman formerly

Married women.

[1] See post, Chap. XVIII.
[2] As to which, see post, Chap. XVIII.
[3] 57 & 58 Vict., c. 30, sec. 11.

laboured under[1]. Thus, the abstract may shew the title to be in a married woman, and that she was married before 1883, and that the property accrued to her before that date[2]. Here a requisition will be necessary, requiring the husband to join in the conveyance, and the married woman to acknowledge the deed; and if the dates do not appear, inquiry must be made with regard to them. If, however, a married woman has sold as a trustee since 1882, it has not been necessary for her husband to join or for the deed to be acknowledged[3]. Again, it is possible that the abstract may shew a married woman to be entitled to the property, but that it is settled upon her without power of anticipation[4]. Here a requisition will be necessary, inquiring whether she is still a married woman, and, if so, that an application must be made, and an order obtained, under section 39 of the Conveyancing Act 1881, enabling her to bind her interest in the property.

Bankruptcy.

Points in connection with bankruptcy may occur in the consideration of a vendor's title[5]. A trustee in bankruptcy may be selling the property of the bankrupt, and an inquiry should then be made as regards the adjudication, and also a request to be furnished with a copy of the certificate by the Board of Trade of the appointment of the vendor as trustee. It may also possibly appear that a conveyance was made after the conveying party had committed an act of bankruptcy on which he was subsequently made a bankrupt. If this is the case, evidence should be called for that the conveyance in question was made *bonâ fide* for value,

[1] See ante, pp. 221-225.
[2] See ante, pp. 226, 227, and *Reid* v. *Reid* there quoted.
[3] 7 Edw. VII., c. 18, sec. 1, ante, p. 70.
[4] See ante, p. 223.
[5] As to bankruptcy, see ante, pp. 202-206, and post, pp. 510, 511.

and without any notice of the act of bankruptcy on the part of the person to whom the property was conveyed.

Outstanding legal estate.

It may be seen from a perusal of the abstract, or from the examination of the deeds, that there is apparently some outstanding legal estate which has never been got in, and requisitions may be necessary with regard to it. Suppose that the abstract discloses a mortgage, and payment off of the mortgage, but no reconveyance of the legal estate, this point must be inquired into. True, if 13 years have elapsed since payment off, the legal estate will be extinguished[1]; but even here a requisition is strictly proper asking if this fact is relied on, and requiring a statutory declaration shewing that no payment has been made, or acknowledgment given, during the last 12 years. If 13 years have not expired since payment off, the proper requisition will be that the mortgagee must either execute a reconveyance or join in the conveyance to the purchaser, and that, if there has been any devolution of the legal estate originally vested in the mortgagee, a further abstract must be delivered, shewing in whom the legal estate is vested, and requiring that such person shall join in the conveyance. Various other points may occur for inquiry in connection with the law of limitation, *e.g.*, in the case of an incomplete disentailing assurance creating only a base fee, which it is now alleged has become, by force of time, enlarged into a fee simple absolute[2]. An abstract may also disclose a beneficiary selling, and the legal estate still in a trustee, who must be, therefore, required either to first convey the legal estate to the beneficiary or else to join in the conveyance.

Re Sands & Thompson.

[1] *Re Sands & Thompson* (1882), 22 Ch. D., 614; 52 L. J., Ch., 406. See ante, pp. 216, 217, 310, 311.

[2] See ante, p. 210.

Rent-charges, etc.

A purchaser may be buying a property absolutely free from any rent or incumbrance, and it may appear, from the abstract, that it is apparently subject to some rent-charge or other annual payment. It will be important to inquire into this matter, and to require that the vendor should either procure a release of the rent-charge or other annual payment, or redeem it under the Conveyancing Act 1881.

Redemption of rent-charge, etc.

This statute enacts[1] that where there is a quit rent, chief rent, rent-charge, or other annual sum issuing out of land, the Board of Agriculture may, on the requisition of the owner of, or any person interested in, the land, certify the amount of money for which it may be redeemed; and then, on proof that one month's notice of intention to pay has been given to the person absolutely entitled to the rent, and that payment or tender of the redemption money has been made to him, the Board give a certificate of redemption which absolutely frees the land. This provision does not, however, apply to tithe rent-charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

Release of part of lands subject to a rent-charge.

Formerly the release of part of the land subject to a rent-charge released the whole of the land; but now the release of part of the land charged does not release the remainder of such land, though this provision is without prejudice to the rights of all persons interested in the lands remaining unreleased and not concurring in or confirming the release[2]. If the owner of the remaining land has concurred in the release, the whole rent-charge is then recoverable out of the unreleased land[3]; but if he did not so

[1] 44 & 45 Vict., c. 41, sec. 45.
[2] 22 & 23 Vict., c. 35, sec. 10.
[3] *Price* v. *John* (1905), 1 Ch., 744; 74 L. J., Ch., 469; 92 L. T., 768.

concur, the unreleased land is only liable for a proportionate part of the original rent-charge[1].

Divorce.

In perusing the abstract it may be seen that the title is traced through a sale under trusts contained in a marriage settlement, or it may be that the trustees under such a settlement are the vendors, and it may also appear that the husband and wife have been divorced, or the marriage annulled. Under the Matrimonial Causes Acts 1859 and 1878[2], after a final decree of nullity or dissolution of marriage, the Divorce Court has power to inquire into the existence of any ante-nuptial or post-nuptial settlements, and to order the whole or a portion of the property settled to be applied either for the benefit of the parties, or of the children of the marriage. It is manifest, therefore, that, under such circumstances, an inquiry ought to be made in the requisitions, whether any order for variation of the settlement has been made, and that, if so, a copy of the order shall be furnished.

Reversionary interests.

A point on which a special requisition should be put in sometimes arises where the property is, or was formerly, of a reversionary nature. It is true, as has been pointed out[3], that by 31 Vict., c. 4, no sale of a reversionary interest can now be set aside only on the ground of undervalue. But it can be set aside on the ground of fraud, and the circumstances may be such that it may be advisable to make some inquiry on the point. The

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[1] *Booth* v. *Smith* (1885), 14 Q. B. D., 318; 54 L. J., Q. B., 119; 51 L. T., 742.

[2] 22 & 23 Vict., c. 61, sec. 5; 41 & 42 Vict., c. 19, sec. 3. In connection with this point it may also be noticed that under the Matrimonial Causes Act 1857 (20 & 21 Vict., c. 85, sec. 45) the Court may, on a decree of dissolution or judicial separation for adultery of the wife, order a settlement of her property for the benefi of the innocent party and the children of the marriage, or either of them.

[3] Ante, p. 96.

following specimen requisition sufficiently explains the matter: "The amount paid by the vendor for the reversionary interest to be sold was less than one-fourth of its actuarial value. Having regard to the extreme inadequacy of the consideration, what evidence does the vendor offer that, under the circumstances of the case, the transaction was reasonable and *bonâ fide?* Unless the purchaser is satisfied as to this, the concurrence of the original owner must be obtained[1]."

Fiduciary relationship.

The abstract may disclose the fact that there have been dealings, in connection with the property, between persons as to whom a fiduciary relationship existed, or some relationship which, on the principles always acted upon in Chancery, might produce a case of constructive fraud. Thus it may appear that a trustee has purchased the property of his *cestui que trust*[2], or that a settlement has been made by a son, or daughter, on a father, or by some person on another occupying a dominant position as regards the settlor[3]. There are many of such positions, including therein not only trustee and *cestui que trust*, and parent and a child, but guardian and ward, agent and principal, solicitor and client, and doctor and patient, and husband and wife[4]. Manifestly, if the vendor himself occupied the fiduciary or dominant position and has acquired the property whilst that position was existing, or even shortly after it has ceased, the purchaser must not fail to make some inquiry on the point, so as to satisfy himself that, under the circumstances, the transaction cannot be called in question; and even if the vendor

Indermaur & Thwaites' Equity, 102, 255.

[1] Jackson & Gossett, 151.

[2] *Fox* v. *Mackreth* (1786), 2 Wh. & Tu., ~~709~~. 722.

[3] *Huguenin* v. *Baseley* (1807), 1 Wh. & Tu., 247; see hereon, Indermaur & Thwaites' Equity, 102, 255.

[4] *Willis* v. *Barron* (1902), A. C., 271; 71 L. J., Ch., 609; 86 L. T., 805; *Bischoff's Trustee* v. *Frank* (1903), 89 L. T., 188.

himself did not occupy any such position, but some antecedent owner at a comparatively recent date did, then equally an inquiry should be made. If the purchaser were to complete without inquiring into the matter at all, he might presently find himself made a party to an action to set the original transaction, and consequently his purchase, aside, for he would be taking with notice, if not of the whole facts at any rate of what was sufficient to put him upon inquiry, and to constitute constructive notice[1]. It will be proper, therefore, in any such case to make a requisition stating the matter as it appears to the purchaser, and asking for an explanation, and that, subject to some satisfactory explanation, the concurrence of the person on whose application the transaction might possibly be avoided must be obtained.

De Witte v. *Addison.*

The "name and arms clause" in a will may sometimes necessitate a special requisition. This is a clause whereby a testator devises his property to a particular person, with a proviso that he shall adopt the testator's name and arms, and that unless he does so within a certain time the property is to go to another person, which is, of course, a good executory devise[2]. Perhaps the abstract plainly shews that the devisee did duly adopt the testator's name and arms within the prescribed time, and that evidence was adduced shewing this when the abstract was examined. If this is not the case, then a requisition would be necessary asking whether the change had been made, and that evidence of it should be furnished. It may, however, be that though the change of name and arms has not yet been made, the time allowed for this has not yet expired. In such a case the purchaser should refuse to complete

Name and arms clause.

[1] *De Witte* v. *Addison* (1899), 80 L. T., 207.
[2] See hereon, ante, p. 100.

until the change has been effected. It may be, however, that the proper time for the change has not yet arrived. Thus, an estate may be limited by way of successive life interests, with a proviso that each tenant for life, on his interest coming into possession, shall, within a specified time, adopt the testator's name and arms. Thus, suppose A is selling to B his life estate expectant on the decease of a prior life tenant, and the obligation to adopt the name and arms only arises when A's life estate falls into possession. In such a case, B should require A to give reasonable security in the shape of a bond, with sureties, that he will make the necessary change when the proper time arises. However, if B, when he agreed to purchase, had no notice of the existence of such a forfeiture clause, no doubt he is entitled to repudiate the purchase if he think fit.

Position of tenant for life selling under Settled Land Act 1882.

If, however, a tenant for life in possession is selling the fee simple under the powers conferred on him by the Settled Land Act 1882[1], and he holds subject to a name and arms clause, and he has not yet made the change but the time for doing so has not yet expired, there is no need for any requisition on the point, as the Act specially confers the statutory powers on a tenant for life, even although his estate is liable to cease, or to be defeated by any executory limitation, gift, or disposition over[2].

Stamps, etc.

If it is found that any deeds are not stamped, or not properly stamped, or not registered when they should have been registered, and the purchaser is not by the contract precluded from raising the point[3], a requisition should be put, insisting on the document

[1] See ante, p. 174.
[2] Settled Land Act 1882, sec. 58 (6).
[3] As to which, see ante, pp. 325, 326.

being stamped or registered, as the case may be, at the vendor's expense.

Lost deeds.

It may possibly happen that one or more of the title deeds cannot be found, and that the vendor has only a copy or copies, or an abstract, in his possession. If it is an old deed of no practical importance, the point may be passed over, though even here a formal requisition, asking for a direct statement as to it, is advisable; but it may be that the missing deed is an important one. The fact that deeds are lost is by no means necessarily a fatal defect in title, provided that proper evidence of the contents can be given, and that there are no circumstances pointing to any possible right in any other person. If the fact that a deed is missing is mentioned in the contract of sale, and the purchaser is by it precluded from raising any objection on the point, such a condition is binding. Where there is no such condition, the purchaser cannot refuse to complete merely because a deed is missing, but he is entitled by his requisitions to make all reasonable inquiries, and to have proper evidence given him of the contents of the deed, and, if it appears to be reasonable, he is entitled also to a bond or covenant of indemnity from the vendor. The position is the same whether the deed in question was missing at the time of the contract, or has only been lost or destroyed by fire after the contract for purchase was entered into[1].

Building Societies, Friendly Societies, and Companies.

On examining a title it is often found that dealings with regard to the property have taken place through Building and Friendly Societies and Companies, and it appears advisable to briefly look at the position with regard to such bodies, for the

[1] *Halifax Commercial Bank* v. *Wood* (1898), 79 L. T., 536; 47 W. R., 194.

purpose of seeing the points that should, according to circumstances, suggest themselves to the practitioner who is investigating the title.

Building Societies.

Building Societies are generally incorporated under the Building Societies Act 1874[1], and then such societies have power, as far as is necessary for the purpose of making advances to members, to hold land, and also may acquire land for the purposes of business, and may sell or deal with any such land. A certificate of incorporation of a Building Society is issued, and this is *primâ facie* evidence of the fact of incorporation; and a printed copy of the rules certified by the secretary, or other officer, of the society to be a true copy, is *primâ facie* evidence of the rules. As regards Building Societies in existence before 1874, and all dealings before that date by Building Societies, it may be noticed that they are entitled to lay out surplus contributions on real security, to be vested in the trustees for the time being of the society, which securities vest in the successors of such trustees[2]. In the case, therefore, of such societies, a purchaser is entitled to consider the point of the changes of trustees, and to require to be furnished with all necessary information on this matter. In the absence, therefore, of a condition disentitling a purchaser to make inquiry (and such a condition is a most common one), a purchaser, according to circumstances, is entitled to make the following requisitions: "The certificate of the incorporation of the X Building Society under the Building Societies Act 1874 must be produced." "The X Building Society appears to have been constituted under the old Act, and not to have been incorporated under the Act of 1874. A certificate from the secretary, or a copy of the rules shewing the

[1] 37 & 38 Vict., c. 42.
[2] 6 & 7 Wm. IV., c. 32 (Building Societies Act 1836).

authority of the trustees, must be produced." "It must be shewn that the persons professing to act as trustees of the X Building Society were duly appointed trustees[1]."

Friendly Societies.

The law relating to Friendly Societies has been consolidated by the Friendly Societies Act 1896[2], under which all property belonging to a Friendly Society is vested in the trustees of the society for the time being, and, upon the death or removal of a trustee, the property of the society vests in the other trustees, and, if a surviving trustee, in his legal personal representative. A Friendly Society may, if its rules permit, acquire, hold, and dispose of land, but a benevolent society cannot hold land exceeding one acre at any one time. An acknowledgment of registry, issued by the Chief Registrar of Friendly Societies, is the proper evidence of the registration of such a society; and a copy of the rules is sufficient to prove their contents. Requisitions that may be proper if the land is being disposed of by a Friendly Society, or has passed through such a society, manifestly suggest themselves, provided the purchaser is not by special stipulation precluded from raising them, *e.g.*, "A copy of the rules of the X Friendly Society must be furnished, as also must the acknowledgment of registry under the Friendly Societies Act. It must also be proved that A, B, and C were duly appointed the trustees of the society[3]."

Companies.

Any company registered under the Companies Acts has power to acquire, hold, and deal with land; but if formed for any object not involving the acquisition of gain by the company or by its individual members, cannot hold more than two acres without a licence

[1] Jackson & Gossett, 46-51.
[2] 59 & 60 Vict., c. 25.
[3] Jackson & Gossett, 161-163.

from the Board of Trade[1]. The company's powers are defined by the memorandum of association; but even though the acquirement of land by a company may strictly be *ultra vires*, yet the land vests in the company. Assuming, then, that land has become duly vested in a company, a purchaser from, or through the company, need not concern himself with the point of whether the company was acting within its powers in purchasing[2], but it is necessary to see that the company has been duly incorporated. Requisitions may, therefore, in the absence of stipulations in the contract to the contrary, be properly made as to the incorporation of the company, and as to the licence from the Board of Trade in the case of companies not formed for the purposes of gain[3]. If a company is wound up under the Companies (Consolidation) Act 1908 either voluntarily or by the Court, the legal estate in its land does not vest in the liquidator but remains in the company. The liquidator has power to sell and can personally transfer the beneficial interest to a purchaser; but the legal estate must be conveyed by the company by the direction of the liquidator, who is empowered to use the company's seal[4].

Costs of evidence required by requisitions.

With regard to various requirements which have been suggested to be made by the requisitions, it must not be forgotten that in many cases the vendor has not the necessary evidence in his possession, and, if that is so, though a purchaser may be entitled to the evidence, yet it must be at his own expense[5]. This often serves as a very excellent safeguard against a purchaser pressing for evidence that he

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[1] See now 8 Edw. VII., c. 69, secs. 16, 19.
[2] *Ayers* v. *South Australian Banking Co.* (1871), L. R., 3 P. C., 548; 40 L. J., P. C., 22.
[3] Jackson & Gossett, 60-62.
[4] 8 Edw. VII., c. 69, secs. 151, 186, 203.
[5] 44 & 45 Vict., c. 41, sec. 3 (6).

may technically be entitled to, but yet, practically, can very well do without. All that has here been detailed concerning requisitions as between vendor and purchaser applies also to the position of mortgagor and mortgagee, and, in a more limited sense, to an intended husband, who is settling property, and his intended wife. In matters between vendor and purchaser, however, we have most usually a special contract between the parties, limiting the rights as to investigation of title, which is not usually the case as to mortgages, and is never so as to settlements. As regards settlements, that strict investigation of title and enforcement of legal rights which we find in the case of sales and mortgages very naturally does not usually take place.

Taking possession may amount to waiver of objection to title.

It is not, as a rule, advisable for a purchaser to take possession of the property he has agreed to purchase, although the vendor may be willing that he should do so, until the title has been thoroughly investigated and all requisitions answered; for, should he take possession, questions may arise as to whether, by so doing, he has waived any objections to the title, and precluded himself from raising them. Taking possession does not necessarily have this effect, but it may; and in every case it is a question depending upon the circumstances, whether the conduct of the purchaser is inconsistent with an intention to call for the title and to insist on objections to it. The general rule is, that if a contract contains no stipulation that possession may be taken before completion, and the purchaser takes possession knowing that there are defects of title which are irremoveable, the taking of possession is a waiver, but not so if the defects are removeable[1].

Re Gloag & Miller.

[1] *Re Gloag & Miller* (1883), 23 Ch. D., 320; 52 L. J., Ch., 654; 48 L. T., 629; 1 Prideaux, 49.

Theoretical knowledge necessary to a practical conveyancer.

From the various matters that have now been brought before the student in this chapter, it must be apparent to him that a theoretical knowledge of our land laws is very essential to a practical conveyancer. We have been dealing with matters of an essentially practical nature, but yet we ever find theory mingled with the practice, and it can only be, firstly, from a thorough knowledge of principles that anyone can hope to become a good conveyancer. The points that may arise on the investigation of title are various in the extreme, and all that has been attempted here has been to put forward the true idea of the investigation and some of the common and most important points that are likely to occur, and that should receive consideration.

Disputes on title.

In the great majority of transactions, however formidable the requisitions on title which are put in may have been, they are all amicably disposed of. The vendor and purchaser, or the mortgagor and mortgagee, are both willing parties, and they act, where necessary, on a reasonable give-and-take principle. This is not, however, always the case, for a requisition may be put in which the vendor is unable or unwilling to comply with, and on which the purchaser may think it necessary, or may choose, to insist. In such a case it may happen that a vendor exercises his right of rescission, provided that, under the contract, he has such a right[1]; or it may be that the vendor, having no right to rescind, admits that he cannot make out a good title, and then he has to pay damages as a consequence of his breach of contract. It may, however, be that the purchaser insists on a certain requisition, while the vendor denies the purchaser's right to what he has demanded, and insists on completion without com-

[1] See as to this, ante, p. 323.

plying with the purchaser's requirements. Formerly, in such a case, the dispute could only be determined by means of an action for specific performance, or for damages, but a summary method of dealing with such matters now exists.

Summons under Vendor and Purchaser Act 1874.

The Vendor and Purchaser Act 1874[1] provides that either party to a contract for the sale of land, or his representatives, may apply by originating summons to a judge of the Chancery Division of the High Court of Justice, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of, or connected with, the contract, not being a question affecting the existence or validity of the contract, and may obtain the decision of the judge thereon, who may also deal with the costs of the application. This enactment generally obviates the necessity for an action, but it must be noticed that it does not apply to a question affecting the existence or validity of the contract. Thus A agrees to sell land to B, but, desiring to evade the contract, alleges that the requirements of the Statute of Frauds have not been complied with[2], and that there is, in fact, no binding contract. Here an action would be necessary to determine the point. However, this limitation of the powers conferred by the Act extends only to points affecting the existence or validity of the contract in its origin, and not to matters subsequently affecting it. Thus A, having agreed to sell land to B under a contract containing a clause giving him a right to rescind the contract on certain events, claims to have abrogated the contract by having given a notice to rescind, but B denies that this is so. This point can be determined by a summons under

Re Jackson & Woodburn.

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[1] 37 & 38 Vict., c. 78, sec. 9.

[2] *E.g.*, such a point as in *Potter* v. *Duffield*, ante, p. 293.

the Vendor and Purchaser Act 1874[1]. So also can a dispute as to the form of the conveyance[2].

Re Hargreaves & Thompson.

On a summons under this Act, the Court has power not only to answer any questions properly submitted to it, but also to direct such things to be done as are the natural consequences of the decision, so that where on such a summons the Court decides that the vendor has not shewn a good title, it can go on to order the vendor to return the deposit, with interest at 4 per cent. per annum, and to pay the purchaser's costs of the investigation of the title[3]. In fact, generally the Court may on such a summons give the same redress as could be obtained in an action, provided always there is a contract existing[4]; but if the effect of the Court's decision is to shew that there is, in fact, no contract, then the purchaser must, as regards damages, be left to bring an action.

Re Davis & Cavey.

Thus in one case A agreed to sell leasehold property to B, and did not disclose the covenants that the lease contained, or give B any opportunity of inspecting the lease. When B came to investigate the title, he raised the point that the lease contained an unusual covenant, but A contended that it was not an unusual covenant. On a summons under the Act to decide this point, the Court came to the conclusion that the covenant was unusual, and that it ought to have been brought to the purchaser's knowledge, and that, as it had not been, the vendor had technically been guilty of fraud and the purchaser was entitled to avoid the contract altogether. The purchaser then asked for an order for the return

[1] *Re Jackson & Woodburn* (1888), 37 Ch. D., 44; 57 L. J., Ch., 243; 57 L. T., 753.

[2] *Re Hughes & Ashley* (1900), 2 Ch., 595; 69 L. J., Ch., 741; 83 L. T., 390.

[3] *Re Hargreaves & Thompson* (1887), 32 Ch. D., 454; 56 L. J., Ch., 199; 55 L. T., 239; 34 W. R., 708.

[4] *Re Walker & Oakshott* (1901), 2 Ch., 383; 70 L. J., Ch., 666; 84 L. T., 809.

of his deposit, with interest thereon, and his costs of investigating the title, but the Court held that it had no jurisdiction, on the summons, to order this, and that the purchaser must bring an action[1]. Where the Court, on the summons, decides that the vendor is in the right, no action for specific performance is necessary or proper, but the Court orders the purchaser to complete[2].

Purchaser's rights of action against vendor.

The rights of a vendor against his purchaser who does not duly complete have already been noticed[3], but it remains to observe the position where the vendor is the party in default. If the vendor, having a title, wilfully refuses to proceed, the purchaser may bring an action against him for specific performance of the contract, or may simply sue him for damages, or may formulate his action in the alternative[4]. If, however, the vendor has not got a good title, it is useless to sue for specific performance, but the proper course is to sue for damages, subject to this, that if it is decided on a summons under the Vendor and Purchaser Act 1874 that the vendor has not got such a title as the rules of law or the special contract require him to give, there is no necessity, ordinarily, to bring an action for damages, as they may be awarded on that summons[5].

Indermaur Thwaites' Equity, 303.

What damages may be recovered by a purchaser of land against his vendor depends on circumstances, and the following rules shew the position:—

Bain v. *Fothergill.*

1. If the vendor cannot, and does not, complete because of a defect in title, and he has not been guilty of any fraud, the purchaser can only recover

[1] *Re Davis & Cavey* (1889), 40 Ch. D., 601; 58 L. J., Ch., 143; 60 L. T., 100.
[2] *Thompson v. Ringer* (1881), 29 W. R., 520.
[3] Ante, p. 327.
[4] See hereon Indermaur & Thwaites' Equity, 303.
[5] Ante, p. 315, note.

as damages the amount of his deposit, interest thereon at 4 per cent. per annum, and the costs he has necessarily and properly incurred in investigating the vendor's title[1].

Day v. *Singleton.*

2. If the vendor can convey, but refuses and neglects to do so, or to do anything that he reasonably and properly can, and should, to bring about completion, then, in addition to the foregoing damages, the purchaser can recover some reasonable damages for the breach of the contract and loss of his bargain[2]. This does not mean that he necessarily can recover all profit he could have made on a resale, though the fact that he has agreed to resell at a profit is evidence in support of his claim to reasonable damages, which claim should apparently be based on the difference between what he agreed to give for the property and what it is actually worth[3].

3. If, however, a vendor has been guilty of fraud in contracting to sell property to which he knew he had no title, then reasonable damages to cover all loss the purchaser has been put to may be recovered in an action *ex delicto*[4].

The subject of searches for incumbrances is not referred to in this chapter, as it is a matter which, in practice, is left until immediately before completion, and, therefore, finds a more appropriate place in the next chapter.

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[1] *Bain* v. *Fothergill* (1874), 7 H. L., 158; 43 L. J., Ex., 243; *Flureau* v. *Thornhill* (1776), 2 W. Bl., 1078.

[2] *Day* v. *Singleton* (1899), 2 Ch., 320; 68 L. J., Ch., 593; 81 L. T., 306; 48 W. R., 18; *Jones* v. *Gardiner* (1902), 1 Ch., 191; 71 L. J., Ch., 93; 86 L. T., 74.

[3] Ibid.; *Engel* v. *Fitch* (1869), L. R., 4; Q. B., 659; 37 L. J., Q. B., 195.

[4] See judgments in *Bain* v. *Fothergill* and *Day* v. *Singleton*, supra.

CHAPTER XII.

PURCHASE DEEDS, AND THE COMPLETION OF PURCHASES.

Preparation of purchase deed.

After the title to the property sold has been duly investigated on behalf of the purchaser, and the various requisitions on, and objections to, title satisfactorily disposed of, the next thing is the preparation of the purchase deed. This is prepared by the purchaser's solicitor, and is, generally, in important cases, settled by a conveyancing counsel; it is then submitted to the vendor's solicitor for approval, and, its form being agreed on, it is engrossed by the purchaser's solicitor, and is afterwards duly executed.

Substance of deed.

The most convenient mode of dealing with the subject will be to take the substance of an ordinary purchase deed and discuss it. The following is an epitome:—

1. This Indenture made the 1st day of January, 1910, between A B, of, etc., and C D, of, etc.
2. Recitals.
3. Testatum. Now this Indenture witnesseth that in consideration of, etc., the receipt whereof is hereby acknowledged, the said A B, as beneficial owner, conveys unto C D.
4. Parcels, or description of the property.
5. Habendum. To hold unto and to the use of C D, in fee simple.
6. In witness, etc.

Attestation is not necessary to the validity of a deed, unless it is required by some statute (*e.g.*, in

the case of bills of sale[1]), or it is a deed executed under a power which was required by the instrument creating it to be attested[2]. In practice, however, deeds are invariably attested.

The convenient rule of practice, where there are several parties to a conveyance, is to make the owner of the legal estate the first party. Thus, if a mortgagor sells and the mortgagee joins in the deed, the mortgagee will be the first party, as he has the legal estate; the mortgagor will be the second party; and the purchaser the third party.

Recitals.

Recitals are by no means a necessary part of the deed. Recitals are of two kinds: (1) Narrative, and (2) Introductory. Narrative recitals serve to explain the title, and shew any facts that it is considered advisable to mention. They may trace the title back for some little time, shewing how the property became vested in the vendor, and this is sometimes advisable where it is a complicated title and it is wished to have a plain record of the position on the face of the deed, and particularly is this the case when the muniments of title are not being handed over to the purchaser. Sometimes the narrative recital consists merely of the bare statement that the vendor is seised in fee simple in possession free from incumbrances. The advantages to be gained from these recitals, apart from convenience, are threefold: (1) They produce estoppel between the parties to the deed[3]. Thus a recital of the vendor's seisin produces an estoppel, and if the vendor had not in fact got the legal estate at the date of the conveyance but does acquire it afterwards, it will pass to the purchaser by virtue of the estoppel

Advantages of recitals.

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[1] Post, pp. 498, 507.
[2] See hereon, ante, p. 340.
[3] 1 Prideaux, 115, 116.

as soon as it is so acquired[1]. But a recital that the vendor is "seised or otherwise well and sufficiently entitled," or is "seised or entitled at law or in equity," does not create an estoppel[1]. It follows that if the purchaser knows the legal estate is outstanding in trustees or mortgagees, he should require it to be conveyed direct to himself and not allow it to be conveyed to the vendor; for if the vendor has conveyed his equitable estate by mortgage or other deed for value containing a recital of his seisin and of which deed the purchaser is not aware, the moment the legal estate is conveyed to the vendor it passes at once to the party entitled under such mortgage or other deed for value, and the purchaser will be unable to set up against that party the doctrine of purchase of the legal estate for value without notice[1]. (2) After 20 years the facts recited in the deed are sufficiently proved by the production of the deed containing the recitals[2]. (3) Any subsequent purchaser must assume, unless the contrary appears, that the recitals in an abstracted document of any other document—which bears date prior to the time fixed (by law or contract) for the commencement of the title which he can demand—are correct, and give all the material contents of the document recited[3]. There is, therefore, no immediate advantage in narrative recitals; but there may be an advantage hereafter. There is, as a rule, no advantage in introductory recitals, but it is customary to express the object of the instrument. Thus: "And whereas the said A B has agreed to sell the hereditaments hereinafter conveyed to the purchaser,

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[1] *Beasley* v. *Burdon* (1839), 2 S. & S., 519; *Heath* v. *Crealock* (1875), 10 Ch., 22; 44 L. J., Ch., 157; *General Finance Co.* v. *Liberator Building Society* (1878), 10 Ch. D., 15; 39 L. T., 600; *Onward Building Society* v. *Smithson* (1893), 1 Ch., 1; 62 L. J., Ch., 138; 68 L. T., 125.

[2] 37 & 38 Vict., c. 78, sec. 2; and see ante, p. 271.

[3] 44 & 45 Vict., c. 41, sec. 3 (3).

at and for the price of £1000." In some cases, however, where there is an ambiguity in the operative part of a deed, it may be explained and controlled by an introductory recital, which, in such a case, may safely be referred to as a key to the intention of the parties[1].

"Beneficial owner."

In the epitome of the contents of a purchase deed which we have given, the vendor is made to convey "as beneficial owner," and this is always so when he is selling and conveying property to which he is beneficially entitled. Before the Conveyancing Act 1881, it was the practice to insert in a purchase deed detailed covenants for title, but that Act now saves the necessity of so doing. It provides[2] that in a conveyance for valuable consideration, when the conveying party is expressed[3] to convey "as beneficial owner," there shall be implied the following covenants for title: (1) That the vendor has good right to convey the property in the manner in which it is expressed to be conveyed; (2) That the property shall be quietly enjoyed by the purchaser without any lawful interruption or disturbance by the vendor or anyone claiming by, through or under him; (3) That the property is, and shall be held, free from all estates, incumbrances, claims, and demands; (4) That the vendor and others claiming through or under him will, at the request and cost of the purchaser, execute and do all lawful assurances and things[4] for more perfectly assuring the property to, and vesting it in, the purchaser. This last covenant is hardly a covenant for title, but rather in

Conveyancing Act 1881, sec. 7.

[1] *Ex parte Dawes, Re Moon* (1886), 17 Q. B. D., 275; 55 L. T., 114; 34 W. R., 752.

[2] 44 & 45 Vict., c. 41, sec. 7.

[3] Even if he has no interest in the property (*May* v. *Platt* (1900), 1 Ch., 616; 69 L. J., Ch., 357; 83 L. T., 123; 48 W. R., 617).

[4] *E.g.*, clear off any incumbrance not referred to in the conveyance (*Re Jones, Farrington* v. *Forrester* (1893), 2 Ch., at 472; 62 L. J., Ch., 996).

connection with the title, and is meant to provide for any possible insufficiency in the deed, and to secure to a purchaser the right to have anything else done that may be reasonably necessary. As regards the other three implied covenants, they are strictly covenants for title, and it should be observed that they are not absolute covenants against the whole world, but are limited to apply only since the last sale of the property, in which respect they differ from the same covenants implied by similar words in mortgages, which are absolute covenants. There is certainly no reason why the covenants for title in the case of a mortgage should in any way be limited, for the measure of damages on breach can only be the mortgage money, interest and costs, all of which could equally be obtained by suing on the covenant to pay. Covenants for title in mortgages do not seem important, but, on a sale, they may prove to be of real importance; not, however, that any purchaser relies in the slightest degree on the covenants for title; he investigates the title, but takes the benefit of the covenants for title for what it is worth. The covenants for good right to convey and for freedom from incumbrances are not continuing covenants[1], and the Statute of Limitations runs from the date of the conveyance[2], and the measure of damages is the difference in the value of the property as it purported to be conveyed and the value of what the vendor then had power to convey[2]. But the covenant for quiet enjoyment is a continuing covenant, and every breach thereof causing damage gives a new right of action; and in such an action, when the purchaser has been evicted, he can recover the full value of the property as it

Difference in covenants on a sale and on mortgage.

[1] *Turner* v. *Moon* (1901), 2 Ch., 825; 70 L. J., Ch., 822; 85 L. T., 90; *G. W. Ry. Co.* v. *Fisher* (1905), 1 Ch., 316; 74 L. J., Ch., 241; 92 L. T., 104.

[2] *Spear* v. *Green* (1874), L. R., 9 Ex., 99; 43 L. J., Ex., 57.

Spoor

stands at the time of the eviction, so that if he buys land, and then builds on it, he may recover the value of the buildings as well as of the land[1].

Further covenant, implied as regards leasehold.

When the property that is being sold is leasehold, then, in addition to the four covenants for title enumerated above, the words, "as beneficial owner," imply a further covenant, viz., that the lease is valid and subsisting, and that all rents have been paid and covenants performed down to the date of the deed[2].

"As trustee" or "as mortgagee," etc.

It does not, however, follow that the party conveying is the beneficial owner, *e.g.*, he may be a trustee, or a mortgagee, selling property under the powers vested in him. On this point, the Conveyancing Act 1881 enacts that if the party is expressed to convey "as trustee," or "as mortgagee," or "as personal representative of a dead person," or "as committee of a lunatic," or "under an order of Court," then in each case the only covenant implied is that he has not in any way incumbered the property, or done anything whereby he is hindered from conveying the property in the way it is expressed to be conveyed[3]. It often happens that a trustee conveys property by the direction of a beneficial owner, and, in that case, the practice is for the deed to express that the trustee conveys "as trustee," by the direction of the beneficiary "as beneficial owner," and the usual covenants for title are then implied on the part of the beneficiary. With regard, generally, to section 7 of the Conveyancing Act 1881, its object is not to introduce any liabilities beyond what were usually in practice created by conveyances, but merely to shorten the instrument.

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[1] *Bunny* v. *Hopkinson* (1859), 27 Beav., 565; 29 L. J., Ch., 93.
[2] 44 & 45 Vict., c. 41, sec. 7.
[3] Ibid., sec. 7.

Throughout the section, the ordinary and established practice of conveyancers is endeavoured to be followed.

Parcels.

With regard to the parcels, or description of the property in the deed, old descriptions should, as far as possible, be adhered to for the purpose of preserving evidence of the identity of the property. The conveyancer should not ordinarily set out by giving the property an entirely new description, although he may think that he can describe it much better than it was described in a former deed. If he does that, he may destroy the evidence of identity which it is most desirable to preserve in a connected manner on the face of the deeds. At the same time he need not slavishly follow a previous description, but, if he invents new parcels, he should refer back to the old ones, *e.g.*, thus: "1 Beauchamp Terrace, etc., formerly known and described as 10 St. George's Road, etc." Here, if the property is known by a totally different name to what it was formerly, it would be absurd to keep up the old description. So again, the last deed may describe the property as arable land, as it was as that time, but since then houses may have been built on it, and the property should be described by its present known description, at the same time inserting words serving to preserve the identity, *e.g.*, "forming part of all that, etc.," thus taking up the description in the former deed.

Habendum.

The function of the habendum is to declare and limit the estate of the grantee. If the estate is simply limited, "Unto and to the use of C D," he will only take a life estate, for to give him either a fee simple or fee tail technical words of limitation are necessary. Before the Conveyancing Act 1881 it was necessary, for the purpose of creating an estate tail, to make the limitation "to C D and the

heirs of his body," but now the limitation may be "to C D in tail" instead[1]. Before the Conveyancing Act 1881 it was necessary, for the purpose of creating an estate in fee simple, to make the limitation "to C D and his heirs," but now the limitation may be "to C D in fee simple" instead[1]. If the grant is simply to C D, even though the word "absolutely," or the words "for ever," or "in fee," may be used, a life estate only will be created[2].

"Unto and to the use."

In our epitome of the substance of a purchase deed, it will be noticed that the property is limited "unto and to the use of" the purchaser. This is common form, for the words "and to the use of" are quite unnecessary. If the deed is a purely voluntary conveyance without either good or valuable consideration[3], these words would be essential, for without them there would be a resulting use to the settlor, and the instrument would, in fact, be a nullity[4]. In the case, however, of a conveyance for value, no point as to a resulting use can arise, for, value being paid, the use is naturally to the person giving the consideration. Another question that may arise on the form of the habendum as we have given it, is whether the grantee is in by the Common Law or by the Statute of Uses. He is in by the Common Law, for the Statute of Uses only applies if one person is seised to the use of another, and here the grantee is seised to the use of himself. In no sense, therefore, does it matter whether the conveyance is merely "unto" the purchaser, or "unto and to the use of" the purchaser.

Reservation of easement.

If some easement is intended to be reserved to the vendor, the practice formerly was for it to be so

[1] 44 & 45 Vict., c. 41, sec. 51.
[2] *Re Ethel*, ante, p. 20. The reverse is the position in wills.
[3] Norton on Deeds (1906), 205; Digby, 4th edition, 327.
[4] Ante, pp. 53, 54.

stated and for the deed to be executed by the purchaser, in which case it operated as a regrant by him of the easement[1]. But if the conveyance is since 1881, the proper plan is to convey the freeholds to the use that the vendor shall have the specified easement and, subject thereto, to the use of the purchaser in fee simple ; and if this is done, the purchaser need not execute the deed[2]. And if a rent is to be reserved, it is in practice created in the same way by the limitation of a use in the freeholds to the vendor in priority to the use to the purchaser in fee simple.

Covenants, etc.

Should there be any restrictive or other covenants they follow on after the habendum. If the purchaser is not getting the title deeds of the property, or some of them, handed over to him, the usual statutory acknowledgment, or acknowledgment and undertaking[3], will then follow on. Subject to these points the purchase deed is complete.

It has already been noticed that the Conveyancing Act 1881 enables covenants for title to be implied into a purchase deed by expressing the vendor as conveying by certain technical words (ante, pp. 372-374), and substitutes a statutory acknowledgment (and undertaking) for the former lengthy covenant for production (and safe custody) of deeds. Some other changes made by the same Act may be conveniently noticed here.

General words.

Formerly in a conveyance it was usual and proper to insert certain "general words" for the purpose of including all easements and other possible interests connected with the land, but it is not necessary since

[1] *Doe* v. *Lock* (1835), 2 A. & E., 705.
[2] 44 & 45 Vict., c. 41, sec. 62.
[3] Ante, pp. 267-269. For forms, see 1 Prideaux, 255, 256, 490-494.

1881 to insert such words, as everything that might formerly have passed by their insertion now passes without the deed being thus lengthened[1]. Another clause which was commonly inserted in conveyances, was one passing all the estate, interest, claim, and demand of the conveying party, but this clause also may be omitted since 1881[2], and in practice it always is omitted. The technical word "grant," which was formerly necessary to be used in some cases in a conveyance, is not now, in any case, essential, and any other equivalent word will do as well[3]. As regards the consideration money expressed to be paid in a deed, it was formerly the practice to not only acknowledge the receipt in the body of the deed, but also to endorse a separate receipt on the deed. If this were not done, although the validity of the deed was not at all affected, a subsequent purchaser of the land might be charged with notice of the existence of a vendor's lien for unpaid purchase money. But as regards a deed executed after 1881, a receipt for the consideration money in the body of the deed is sufficient without a receipt being endorsed thereon[4]; and it is the usual practice, now, merely to acknowledge the receipt in the body of the deed, and not also to endorse a receipt. Covenants made after 1881 relating to land of inheritance are to be deemed to be made with the covenantee, his heirs and assigns, and relating to other lands are to be deemed to be made with the covenantee, his executors, administrators, and assigns[5]. Covenants made after 1881 bind the heirs

All the estate, etc.

Receipt for consideration money.

Covenants.

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[1] 44 & 45 Vict., c. 41, sec. 6.

[2] Ibid., sec. 63. As to the effect of the clause and this section now, see *Thellusson* v. *Lidiard* (1900), 2 Ch., 635; 69 L. J., Ch., 673; 82 L. T., 753.

[3] Ibid., sec. 49. See, however, as to the peculiar virtue of the word "grant" in conveyances by railway companies and other bodies having power to compulsorily take lands, post, p. 397.

[4] Ibid., secs. 54, 55.

[5] Ibid., sec. 58.

as well as the personal representatives of the covenantor, without naming them[1]. Covenants made after 1881 with two or more persons jointly, to pay money or make a conveyance or do any other act to them or for their benefit, shall, unless otherwise stated, enure for the benefit of the survivor or survivors and any other person on whom the right to sue devolves[2]. A difficulty, also, which formerly existed in conveyances, and which has now ceased to exist, was as regards a husband conveying to his wife, or a wife to her husband, or a person conveying to himself and another jointly. Formerly, as regards freehold property, it was necessary to convey to a third person to the use of the party or parties intended to take, and as regards leasehold and other personal property it was necessary to assign to a third person, who would then assign to the party or parties intended to take. Direct conveyances or assignments may, however, now be made[3]. It is, therefore, evident that the Conveyancing Act 1881 has done much towards shortening and simplifying purchase deeds.

Conveyance to husband or wife, etc.

Turning now to a purchase of leasehold property, we have already noticed that a further covenant for title is implied in the conveyance by the use of the words "as beneficial owner" than is the case as regards freeholds[4]. The purchase deed also takes, in practice, a little different shape, it being customary to always recite the lease under which the property is held, setting out in the recital the parcels, or

Purchase of leaseholds.

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[1] 44 & 45 Vict., c. 41, sec. 59.

[2] Ibid., sec. 60.

[3] 22 & 23 Vict., c. 35, as to leaseholds and chattels in possession, and 44 & 45 Vict., c. 41, sec. 50, as to freeholds and *choses in action*. No Act says a husband can assign leaseholds direct to his wife, or the wife to her husband; but a lease by a husband to his wife under the Settled Land Acts was held valid in *Gilbey* v. *Rush* (1906), 1 Ch., 11; 75 L. J., Ch., 32; 93 L. T., 616.

[4] Ante, p. 374.

description of the property, and then, in the operative part of the deed, the property is described as "the messuage and premises comprised in and demised by the hereinbefore recited indenture of lease." There is also, generally, in the deed a covenant by the purchaser to pay the rent reserved by the lease and perform the covenants and conditions contained therein, and keep the vendor indemnified therefrom, a matter which must be thoroughly understood.

Liability of a lessee.

A lease always contains covenants to pay rent and perform various other obligations[1], and the lessee does not get rid of this liability by afterwards disposing of the property, but he remains continually liable by reason of his contract, and this liability continues even after his death, subject to the provisions of 22 & 23 Vict., c. 35, sec. 27. The liability, therefore, of a lessee is one depending on the privity of contract existing between him and the lessor. Any assignee is, however, in his turn, also liable to the lessor on covenants which run with the land; and as to what covenants do, and what do not, run with leasehold land, certain rules were laid down in *Spencer's Case*[2]. These rules are: (1) That when the covenant extends to a thing *in esse*, parcel of the demise, the covenant binds the assignee without express words, *e.g.*, if the lessee covenants to repair the demised premises; (2) That when the lessee covenants for himself "and his assigns" to do some act upon the property demised, though not in existence at the time of the demise, then the assignee is bound, *e.g.*, if he covenants to build a conservatory on the land; (3) That even though the lessee covenants for himself and his assigns, yet if the act is unconnected with the demised premises, the assigns are not bound, *e.g.*, if a tenant in his lease

Spencer's Case.

[1] See as to leases, post, Chap. XIII.
[2] (1583), 1 Smith's Leading Cases, 55.

covenants to build a conservatory on other land demised to him by the lessor by a separate lease. But where an assignee is liable to the lessor, it is by reason of privity of estate, and not privity of contract, so that if a lessee does not assign his whole term, but merely creates a sub-lease, the sub-lessee cannot be liable to the original lessor, for there is here neither privity of contract nor of estate between them.

When covenant to indemnify vendor inserted.

When an original lessee sells the property, he is always entitled to a covenant by his purchaser to pay the rent and perform the covenants, and keep him indemnified therefrom. If, however, the vendor is not the original lessee, but is merely an assignee, and he did not himself covenant with his assignor to pay the rent and perform the covenants, then he is not, on selling in his turn, entitled to any such covenant from his purchaser. The reason for this is that his liability, on the principle of privity of estate, only continues whilst he remains the owner, and terminates as soon as he assigns over. In most cases, whether the vendor is the original lessee or an assignee, it will be found that he is liable because of direct covenant, but this is not always so. Thus, suppose that A, a lessee, settles the property by assigning it to B, as a trustee. Here B would not covenant to pay the rent and perform the covenants, and indemnify A. If B is now selling the property under a trust for sale contained in the settlement, he will not be entitled to any covenant of this kind from his purchaser. The actual assignee for the time being of a lease is always bound to indemnify the original lessee, even in the absence of any covenant to indemnify anybody in his assignment[1]; but the underlessee is never so liable, although in possession[2].

[1] *Moule* v. *Garrett* (1872), L. R., 7 Ex., 101; 41 L. J., Ex., 62.
[2] *Bonner* v. *Tottenham Building Society* (1899), 1 Q. B., 161; 68 L. J., Q. B., 114; 79 L. T., 611.

Sale by lessee of part of property.

If a lessee has sold part only of the land comprised in the lease, there are two ways of taking the conveyance[1]. One way is by deed of assignment, in which the vendor assigns to the purchaser the part sold for the residue of the term at an apportioned rent (which does not bind the lessor, as he is no party to it) and subject to the covenants in the lease (except as to rent) which relate to the part sold. The deed will also contain mutual covenants by the vendor and purchaser that each will pay the rent and perform the obligations under the lease as to his portion of the land, and mutual covenants to indemnify each other, and mutual powers of distress and entry up to the limits of the perpetuity rule. The other plan is for the vendor to sub-demise the part sold to the purchaser for the residue of the term less one day, at the apportioned rent agreed on, and subject to the covenants in the lease (except as to rent) which relate to the part sold.

Copyholds.

Copyhold property is conveyed by surrender and admittance[2], but the surrender is preceded by a deed of covenant to surrender. By this deed the vendor, as beneficial owner, covenants to surrender the property, and this deed contains any covenants, conditions, and stipulations that may, under the circumstances, be necessary. The words, "as beneficial owner," in such a deed import the ordinary covenants for title[3]. After the deed comes the surrender, and then the admittance, the fine on admittance being paid by the purchaser, which is the case even if the vendor has covenanted to convey and assure to the purchaser at his own expense, for the fine is not due until after admittance, whilst the assurance is complete on the purchaser being

Fine on admittance.

[1] 1 K. & E., 604, 609.
[2] Ante, p. 153.
[3] 44 & 45 Vict., c. 41, sec. 2 (5).

admitted. If a corporation purchases copyholds, they are surrendered to trustees for the corporation, who are duly admitted. If copyhold property is purchased by several persons as joint tenants, the admission of one is the admittance of all, and one amount only is payable as a fine, but calculated thus: The full fine for the first tenant, half of that for the second, half of that for the third, and so on. Tenants in common must, however, be admitted separately, and a separate fine paid in respect of each share. If copyhold property is surrendered to one for life. and then by way of remainder, the admission of the tenant for life is the admission of the remainderman, and one fine only is payable in the absence of any contrary custom[1]. The fine is either certain in amount, or arbitrary; but an arbitrary fine must not exceed two years' improved value of the land after deducting any quit rent[2].

Corporation.

Joint tenants, etc.

Property which is not true copyhold property, but is customary freehold, is ordinarily conveyed by deed and admittance, but sometimes by surrender and admittance. Which is the proper mode of conveyance depends on the custom of the manor[3].

Customary freeholds.

It sometimes happens that a person who has contracted to purchase property, before he completes his purchase agrees to sell it to another. Thus, B, having agreed to purchase of A a house for £1000, agrees, in his turn, to sell it to C for £1200. In such a case there is no occasion for B first to complete his purchase, and then to convey to C, but the transaction may be effectually carried out by one deed, and B is entitled to have it so carried out. The deed in such a case takes the following form:

Sub-sale.

[1] 1 Prideaux, 104, 105.
[2] 1 Watkins' Cop., 308.
[3] 1 Prideaux, 114.

A is the party of the first part, B of the second part, and C of the third part. The original sale to B, and the sub-sale to C, are recited. It is witnessed that in consideration of £1000 paid by C to A at the request of B, and £200 paid by C to B, A, as beneficial owner, at the request of B conveys, and B confirms, to C. The expense of two separate purchase deeds, and the separate stamps thereon, is thus avoided, but the stamp is always paid on the amount of the sub-purchase money—thus, in the above example, it would be paid on £1,200[1].

Points immediately before completion.

The purchase deed being settled between the solicitors of the vendor and purchaser, the engrossment is sent to the vendor's solicitor for the purpose of examination with the draft, and the vendor's solicitor is asked for a statement of figures on completion, and for an appointment to complete. The place where the purchase is to be completed has been dealt with in a previous chapter[2]. The object of asking for a statement of figures is that the purchaser's solicitor may check the various apportionments, calculation of interest (if any), and, generally, see that he is in agreement with the vendor's solicitor as to the amount to be paid on completion. Then, as shortly as possible before completion, all necessary searches for incumbrances, etc., are made, the necessity of which have already, to some extent, been noticed[3].

Searches for incumbrances.

In practice, particularly in the country, searches for incumbrances are very often omitted, but the practitioner must bear in mind that, by omitting to make the necessary searches, he takes upon himself an obligation, and risk, which he has no occasion to,

[1] 54 & 55 Vict., c. 39 (Stamp Act 1891), sec. 58 (4).
[2] Ante, pp. 305, 306.
[3] Ante, pp. 199, 201, 202, 206.

for if it should afterwards be found that there is some incumbrance on the property purchased which might have been discovered by searching, and the purchaser suffers loss thereby, the solicitor is liable to his client for negligence. Still, it must be admitted that in many cases, where the parties are well known, the risk run is so infinitesimal that the omission to make the searches may well be excused. It is, however, necessary here to look at what are the strictly proper searches to be made before completing a purchase.

1. A search should be made in the office of Land Registry[1] for (1) writs and orders affecting land, (2) *lites pendentes*, (3) annuities charged on land, (4) deeds of arrangement affecting land, and (5) statutory land charges. A search for Crown debts was formerly necessary, but now these only bind the land if a writ or order to enforce them has been issued and registered as before explained[2]. A search for judgment debts is no longer necessary[3]. The register of writs and orders affecting land was created by the Land Charges Act 1888[4]; it must be searched for five years back; and in this register are found writs of *elegit*, of *fi. fa.*, as to leaseholds, of extent, of possession, and of ejectment, orders for sale or foreclosure, orders appointing a receiver or sequestrator, injunctions, orders under the Lunacy Acts, restraining and charging orders, and any writ or order directly affecting land. The register of *lites pendentes* was created by the Judgments Act 1839[5], and must be searched for five years back. The register of annuities charged on land was created

1. At Land Registry.

[1] As from 1st September, 1900, these registers and all business connected therewith were transferred from the Central Office of the High Court to the Land Registry, by Order in Council, under the Land Charges Act 1900 (63 & 64 Vict., c. 26).

[2] Ante, p. 202.

[3] Ante, p. 199.

[4] 51 & 52 Vict., c. 51.

[5] 2 & 3 Vict., c. 11.

by the Judgments Act 1855[1], and should be searched right back to its commencement on 26th April, 1855, as there is no provision for re-registration. The register of deeds of arrangement must be searched back to the date when the party searched against became entitled, as there is no provision for re-registration; it was created by the Land Charges Act 1888[2], and is an additional precaution, as regards land, to the provision for compulsory registration of all deeds of arrangement in the Central Office of the High Court required by the Deeds of Arrangement Act 1887[3]. The register of statutory land charges was created by the Land Charges Act 1888[4], and in it will be found, for example, charges under the Improvement of Land Acts, Settled Land Acts, section 33 of the Finance Act 1896, and the Agricultural Holdings Acts. Writs and orders affecting land, and *lites pendentes* require to be re-registered every five years[5], and, therefore, a search need only be made for these matters extending back five years, in the names of all persons interested in the property during that period. The purchaser's solicitor can make all the foregoing searches himself at the Land Registry, or he can require an official search to be made and obtain a certificate of the result. This certificate is conclusive evidence in favour of a purchaser, and a solicitor obtaining such a certificate is not answerable to his client for any loss that may arise from error therein, and if he is acting for trustees or others in a fiduciary position, such persons are also protected[6]. If the search discloses any entry which still affects the land, it must be cleared off before completion, but if a *lis*

Official search.

[1] Ante, p. 117.
[2] 51 & 52 Vict., c 51.
[3] 50 & 51 Vict., c. 57.
[4] 51 & 52 Vict., c. 51.
[5] Ibid., sec. 5; 2 & 3 Vict., c. 11, sec. 7.
[6] 45 & 46 Vict., c. 39, sec. 2; 51 & 52 Vict., c. 51, sec. 17.

pendens is found, the purchaser cannot necessarily refuse to complete his purchase because the action is pending[1], and if upon inquiry the action turns out not to involve any question of title, charge, or property relating to the land bought, it may safely be disregarded[2].

2. Bankruptcies.

2. A search should be made at the Bankruptcy Court for bankruptcies for the period of 12 years prior to completion, not only against the vendor, but other persons interested in the property during that period, but chiefly directed against the vendor. The great importance of this search, unless the position of the party concerned is well known, has already been referred to[3]. Usually, this search is only carried as far back as the last conveyance on sale.

The above may be considered the most usual and proper searches, and of them, ordinarily, the search for bankruptcies is the most important. These searches will only be made against beneficial owners and not trustees, except the search for *lites pendentes*. Various other searches may, on occasion, be necessary or advisable, *e.g.*, in the Central Office for disentailing deeds, deeds conveying land to charities, and some other enrolled deeds, *e.g.*, a deed declaring a change of name. If the vendor is a company, search should be made in the register kept by the Registrar of Companies[4], and in the register of mortgages kept by the company[5]. In the case of copyholds, the court rolls should be searched for entries affecting the property.

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[1] *Bull* v. *Hutchens* (1833), 32 Beav., 615.
[2] Dart, 1220.
[3] Ante, pp. 205, 206, and case of *Re New Land Development Association* there referred to.
[4] 8 Edw. VII., c. 69, secs. 93, 98.
[5] Ibid., secs. 100, 101.

Middlesex and Yorkshire.

In Middlesex, or Yorkshire, a search must always be made in the local register. Strictly, there is no limit for this search, but in practice it is restricted to the period which has elapsed since the last sale, or mortgage, of the property. If the title has been registered under the Land Transfer Acts 1875 or 1897, a search must be made in the Land Registry established under those Acts, and when land has been so registered no search need be made in the local registry for Middlesex or Yorkshire, as regards dealings with it since registration under the Acts, for when thus registered it ceased to be subject to the local registries. In all cases, it is prudent to search the public index map of registered land kept at the Land Registry, to see if the title has been registered there; and the register kept by the local authority, of unsatisfied charges for street improvements.

Land Transfer Acts.

Inquiry as to tenancies.

In addition to making searches, it is usual for the purchaser's solicitor to make inquiry of the tenants as to who they pay their rent to, and as to the nature and terms of their tenancies. But there is no obligation on a purchaser or mortgagee to make such inquiries; and if he does not inquire, or if inquiry discloses that the rents are paid to an estate agent, and he makes no further inquiry, such purchaser or mortgagee will not be affected with notice that the rents are paid to a person whose receipt of them is inconsistent with the title of the vendor or mortgagor[1]. Notice of a tenancy affects a purchaser or mortgagee with notice of the tenant's rights, but not with notice of the title of the tenant's landlord[1].

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[1] *Hunt* v. *Luck* (1902), 1 Ch., 428; 71 L. J., Ch., 239; 86 L. T., 68.

Attending completion.

The purchaser's solicitor then attends the appointment to complete, accompanied, if it is thought desirable, by his client, who should attend with him if he has to execute the deed, which is not the case on an ordinary purchase of freeholds, or copyholds, though it usually is on the purchase of leaseholds. The vendor need not necessarily be in attendance at the completion, for he may have executed the deed beforehand. Before the Conveyancing Act 1881 when no special circumstances existed to make the demand unreasonable, a purchaser was entitled to have the conveyance executed in the presence of his solicitor, and to pay the purchase-money to the vendor himself[1]. It was then common practice for a vendor, who did not desire personally to attend the completion, to give an authority in writing to his solicitor to receive the money, and a purchaser could safely act on this, though without such an authority he was not safe in paying to the solicitor. A purchaser was generally content with the attestation of the vendor's solicitor, or some other credible witness, and did not insist on actually seeing the deed executed, or his solicitor doing so and attesting it, and was also content to pay over the purchase-money to the vendor's solicitor on the authority from the vendor, as that was an adequate protection to him. The law was materially altered by the Conveyancing Act 1881[2], which provides that on a sale the purchaser shall not be entitled to require to have the conveyance to him executed in his presence, or in that of his solicitor as such, but shall be entitled (at his own cost) to have the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor[3];

Conveyancing Act 1881.

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[1] *Viney* v. *Chaplin* (1858), 2 De G. & J., 468.
[2] 44 & 45 Vict., c. 41.
[3] Ibid., sec. 8.

and, also, that where a solicitor[1] produces a deed, duly executed, and having a receipt therein for the consideration, that shall be sufficient authority for payment of the money to the solicitor, without such solicitor producing any separate, or other, direction or authority[2]. This enactment did not apply at first to trustee vendors, who had to personally attend and receive the money[3]; but it was extended to them by the Trustee Act 1893[4]. It will be noticed that a purchaser is only safe in paying over to "a solicitor" who produces the deed. If, on completion, the vendor's solicitor is not himself in attendance, but his clerk is, and such clerk is not himself a solicitor, the purchaser is not protected by payment to the clerk.

Other points.

The purchaser's solicitor, on completion, takes care to see that the purchase deed has been properly executed and attested, and then pays over the amount due on completion, in cash, bank notes, or by a banker's draft. It is not usual to give a cheque for the money, unless the vendor's solicitor has previously intimated his willingness to take a cheque. He goes carefully through the deeds to see that they are all handed over to him, or that all that should be, are handed over. If the property is leasehold, he inspects the last receipt for ground rent. It is also desirable to see the last receipts for rates, taxes, and other outgoings for which the property might be liable. If the property is in the occupation of a tenant, he gets the

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[1] He must be the solicitor acting for the party or parties to whom the consideration is expressed to be paid, per North, J., in *Day* v. *Woolwich Equitable Building Society* (1889), 40 Ch. D., 491; 58 L. J., Ch., 280; and the money must be actually paid to the solicitor and not set off in account (*Coupe* v. *Collyer* (1890), 62 L. T., 927).

[2] 44 & 45 Vict., c. 41, sec. 56. See hereon *King* v. *Smith* (1900), 2 Ch., 425; 69 L. J., Ch., 458; 82 L. T., 815.

[3] *Re Bellamy & Metropolitan Board of Works* (1883), 24 Ch. D., 387; 52 L. J., Ch., 870; 48 L. T., 801.

[4] 56 & 57 Vict., c. 53 (Trustee Act 1893), sec. 17.

vendor, or his solicitor, to sign a direction to the tenant to pay the future rent to the purchaser. If it is the case of an auction sale on which a deposit has been received by the auctioneer, bearing in mind that such auctioneer only holds it as a stakeholder, the purchaser signs a letter to the auctioneer, informing him he may now pay over the deposit to the vendor or his solicitor. Should the purchaser be taking over the vendor's fire insurance on the property, the purchaser's solicitor should see that a memorandum of transfer of the policy is endorsed on it, and he should afterwards proceed to get the transfer of the policy duly assented to by the insurance company. Everything is then complete, and it only afterwards remains to stamp the purchase deed[1], and should any registration be necessary, *e.g.*, in Middlesex or Yorkshire, or under the Land Transfer Act 1897, to proceed to register[2]. In the case, also, of leasehold property, it may be that the lease contains a covenant to give notice to the lessor of any assignment of the premises, and perhaps, also, to pay a certain fee in respect thereof, and this covenant must be complied with.

This concludes the direct subject of the purchase deed, and the completion of the purchase; but it is advisable to also refer to some other particular matters.

Sale by a mortgagor.

A person who has mortgaged his property may have agreed to sell it, intending to pay off the mortgage out of the purchase-money. There are two ways in which the transaction can be carried out: (1) The vendor's solicitor may arrange that a reconveyance from the mortgagee shall immediately precede the conveyance to the purchaser; (2) The

[1] As to stamps, see post, Chap. XVIII.
[2] As to registration, see post, Chap. XVII.

mortgagee may be made a party to the conveyance. In the first case, the course is to proceed by anticipation, as if the property had been duly reconveyed to the vendor, and the vendor's solicitor, shortly before the time for completion, submits the draft reconveyance to the mortgagee's solicitor, and, it being approved, he furnishes a copy, or abstract, of it to the purchaser's solicitor, and sends the engrossment of it to the mortgagee's solicitor. The appointment to complete is then attended, not only by the solicitors for the vendor and purchaser, but also by the mortgagee's solicitor; the reconveyance is dated the day before the purchase deed, or the same day, and the purchaser pays out of his purchase-money to the mortgagee the amount due to him, and the balance to the vendor. In the second case, where the mortgagee is made a party to the conveyance, the draft deed has to be submitted to the solicitor for the mortgagee, as well as to the vendor's solicitor, and the attendance of the solicitors, and the payment of the money, is the same. In such cases it is usual and proper that the completion shall take place at the office of the mortgagee's solicitor, unless an arrangement to the contrary is made. In this second case, the conveyance may contain a declaration that the mortgage debt shall be deemed to be kept alive for the benefit of the purchaser as a protection against mesne incumbrances; and that declaration will be effectual to protect the purchaser against any possible concealed incumbrances created since the mortgage, and of which the purchaser had no notice when he took his conveyance[1]; and it will also keep the mortgage debt alive in favour of the purchaser's next-of-kin against his heir[2]. The costs of the mortgagee's solicitor must be paid by the

[1] *Thorne* v. *Cann* (1895), A. C., 11.
[2] *Re Gibbon, Moore* v. *Gibbon* (1909), 1 Ch., 367; 78 L. J., Ch., 244; 100 L. T., 231.

vendor, in the absence of any condition to the contrary; and a condition that the assurance and every other instrument for perfecting the vendor's title shall be "prepared" at the purchaser's expense does not throw on the purchaser the costs of perusing and executing the conveyance on behalf of a mortgagee who joins in the purchase deed[1].

Sale by mortgagor of part of property mortgaged.

In some cases a mortgagee is satisfied that he can safely allow his mortgagor to sell a part of the property mortgaged and receive the purchase-money for it, because he has an ample security in the remaining property. In such a case the mortgagee is made a party to the deed, for the purpose of releasing the property sold.

Mortgagee retaining deeds.

In any case in which a mortgagee retains part of the land, he, of course, retains the mortgage deed and any other deeds relating to the estate in mortgage, but he gives the purchaser an acknowledgment of right to production. He does not give the undertaking for safe custody. The proper course in such a case is for the purchaser, in addition to the mortgagee's acknowledgment, to take a covenant from the vendor that when the deeds come into his possession by reason of satisfaction of the mortgage debt, or otherwise, he will, on the request and at the cost of the purchaser, give the statutory undertaking for safe custody, and, until then, that he will hold them subject to the same obligations, in all respects, as if such undertaking had been given[2].

Vendor dying before completion.

If a person having agreed to sell freehold or leasehold property dies before completion, his executor or administrator is the proper person to convey or

[1] *Re Sanders & Walford* (1900), 83 L. T., 316.
[2] See precedent in 1 Prideaux, 287.

assign to the purchaser. This always was so as to leaseholds, and is so now with regard to freeholds[1].

Cestuis que trustent joining in a sale.

We have noticed that trustees who are selling only convey "as trustees," and that, therefore, the purchaser does not get the ordinary covenants for title, but merely a covenant that the trustees have done no act to incumber. Where, however, the *cestuis que trustent* are *sui juris*, it is not unusual for them to join in the deed, and, as beneficial owners, direct the trustees to convey, and then the purchaser gets the benefit of their implied covenants. As a general rule, the concurrence of the *cestuis que trustent* cannot be required where trustees have an effectual power of sale[2]; but there may be circumstances, *e.g.*, where the *cestuis que trustent* have been in possession, in which it is desirable and proper to make them parties[3]. If the trustees' power of sale is only exerciseable by consent or direction of a beneficiary, or trustees under a simple trust sell at the request of the beneficiary, such beneficiary must give the usual vendor's covenants for title to the purchaser[4].

Sale under the Settled Land Act 1882.

Where property is sold by a tenant for life under the provisions of the Settled Land Act 1882[5], the tenant for life is made the party of the first part, the trustees of the settlement of the second part, and the purchaser of the third part. The settlement is recited, and that the parties of the second part are trustees for the purposes of the Act. The consideration money is expressed to be paid to the trustees, and the tenant for life "in exercise of the power for this purpose vested in him by the Settled

[1] 44 & 45 Vict., c. 41, sec. 4; 60 & 61 Vict., c. 65, sec. 1.
[2] Dart, 568-570.
[3] 1 Prideaux, 329.
[4] 1 Williams' Vendor and Purchaser, 578, 579.
[5] Ante, p. 174.

Land Acts 1882 to 1890, and of all other powers (if any) him hereunto enabling" and as beneficial owner, conveys the property to the purchaser. Then follows a proviso that, as regards the covenants for title implied by the words "as beneficial owner," they shall not extend to the acts or defaults of any person other than himself and persons claiming, or to claim, under or in trust for him. It does not follow, however, that the purchase money is paid to the trustees, for the tenant for life may have required it to be paid into court, in which case the requisition to that effect, and the payment into Court, are duly recited.

Sales under order of the Court.

In the case of a sale under an order of the Court, *e.g.*, in an administration action, a purchaser always pays his money into Court, under a direction obtained from the master for that purpose, before the date for completion. The fact that it is a sale under the Court's order, the details in connection with it, the payment into court, and the certificate of the result of the sale, are all recited, and, subject to these points, the deed is an ordinary purchase deed[1].

Conveyance to a railway company.

Where a railway company or other body, under the provisions of the Lands Clauses Act 1845, purchase land for the purposes of their undertaking, whether the price is arrived at by agreement, arbitration, or a jury, the conveyance takes the ordinary form; but it must, in this case, be remembered that minerals do not pass, unless they are expressly mentioned, except in so far as it may be necessary to dig and carry away or use the same in the construction of the works[2]. If the land is copyhold, it is conveyed by a deed poll, executed by the landowner, in the form printed in the Lands Clauses Act 1845, and

[1] For precedent, see 1 Prideaux, 365.
[2] 8 & 9 Vict., c. 20 (Railway Clauses Act 1845), sec. 77.

entered on the court rolls of the manor[1]; and within three months from such entry (or one month from taking possession) the company must apply to the lord to enfranchise[2]. If land is compulsorily acquired under the Lands Clauses Act 1845, *e.g.*, by a railway company, and the owner refuses to take the compensation money or to execute the conveyance, or fails to make out a title, or is abroad or cannot be found, the promoters pay the money into Court to the credit of the parties interested in the land, and can then execute a deed poll fully reciting the facts which vests the land absolutely in them[3].

Sale of superfluous lands by a railway company.

Conveyances of superfluous lands acquired by a railway company or other body under the Lands Clauses Act 1845 deserve passing notice. It is provided that, within any period prescribed by their special Act, or if no period is prescribed, then within 10 years after the time limited for completion of the railway or other works, the promoters shall sell and dispose of any superfluous lands, and, in default thereof, the same shall vest in the adjoining owners[4]; and that before thus disposing of such lands they shall first offer to sell them (unless they are in a town or built upon) to the person then entitled to any lands from which the same were originally severed, and, if such person refuses to purchase or cannot be found, then the lands shall be offered to the adjoining proprietors in such order as the promoters think fit, each in his turn having the right of pre-emption[5]. Any such right of pre-emption must be exercised within six weeks of the offer[6], and, if the price cannot be agreed upon, it is to be ascertained by arbitration[7]. Land

[1] 8 & 9 Vict., c. 18 (Lands Clauses Act 1845), secs. 81, 95.
[2] Ibid., sec. 96.
[3] Ibid., secs. 76, 77.
[4] Ibid., sec. 127.
[5] Ibid., sec. 128.
[6] Ibid., sec. 129.
[7] Ibid., sec. 130.

is properly superfluous if, at the end of the prescribed period or the 10 years, it is not then required for the purposes of the railway and there are no purposes connected with the railway for which it can reasonably be expected that it will be wanted[1]. Manifest points for inquiry, or requisitions, here present themselves if superfluous land is purchased by a person other than the original owner from whose lands the severance was made; and, in every conveyance, all proper recitals should be included, to shew that the company is entitled to sell to the purchaser. Thus, recitals of the original conveyance to the company, of the time of completion of the railway, that the land is not required by the company, and that the lands have been duly offered to the person, or persons, entitled to have the offer[2]. It may be noticed that by the Lands Clauses Act 1845[3] it is provided that, in conveyances of land by the promoters of any undertaking having power to acquire land compulsorily, the word "grant" implies the usual covenants for title given by a beneficial owner.

Covenants implied by word "grant."

In some parts of England it is usual, instead of granting long building leases at a rent, and thus creating the relationship of landlord and tenant, to grant the lands in fee simple, subject to a perpetual rent-charge, which is commonly styled a fee farm rent. It must be borne in mind, in such cases, that there is no reversion or seignory in the grantor, and that certainly covenants as regards building and repairing do not run with the land, nor with the rent, either at law or in equity, so that an assignee of the land cannot be sued, nor can an assignee of the rent sue, thereon; but, on the equitable

Grant of lands in fee simple subject to a perpetual rent.

[1] *Hooper* v. *Bourne* (1880), 5 App. Ca., 1; 49 L. J., Q. B., 370.
[2] See precedent, in 1 Prideaux, 393.
[3] 8 & 9 Vict., c. 18, sec. 132.

principle of notice, a liability on negative covenants is successfully made to pass to subsequent alienees[1]. Such a deed takes the following shape: Grant to the purchaser in fee simple, to the use that the grantor shall have in fee simple a specified perpetual yearly rent-charge issuing out of the land, and subject thereto to the use of the grantee in fee simple; covenants to pay the rent-charge, and generally such covenants as may be considered advisable and proper, which are of a very similar nature to the covenants in an ordinary building lease. There should be a clause restricting the powers of distress and entry given by section 44 of the Conveyancing Act 1881[2] to some such period as the life of the survivor of the issue now living of the King and 21 years longer, and to such further period (if any) as the law permits; and a power (similarly restricted as to time) for the owner of the rent-charge to enter and amend breaches of covenant and recoup himself out of the rents[3].

Costs.

The costs in connection with sales and purchases are borne thus. The vendor bears his own costs of: (1) Matters preliminary to the sale, such as preparation of the contract, conditions of sale, and auctioner's charges; (2) Obtaining, preparing and delivering a perfect abstract; (3) Production of deeds and other documents in his possession, for the verification of the title; (4) Perusal of the purchase deed; (5) Obtaining the execution of the purchase deed, and of completing; (6) Any extra costs created by incumbrances he has created on the property, *e.g.*, a reconveyance by a mortgagee, or the mortgagee joining in the conveyance. The purchaser bears his own costs of: (1) Matters preliminary to the sale, such

[1] See herein, ante, pp. 330, 331, and *Tulk* v. *Moxhay* there quoted.
[2] Ante, p. 116.
[3] Williams' Vendor and Purchaser, 384, 385; 1 K. & E., 337, 338.

as perusing the contract; (2) Perusing the abstract, and investigating the title; (3) Production of deeds and other documents of title not in the vendor's possession; (4) Preparation and engrossment of the conveyance; (5) Actually completing the transaction, including stamping the deed, and, if necessary, registering it in Middlesex or Yorkshire, or under the Land Transfer Act 1897; (6) Anything that may subsequently be necessary, *e.g.*, registering with a lessor and paying a fee, or getting admitted to copyholds and paying the fine due on admittance.

CHAPTER XIII.

LEASES.

What is a lease?

A LEASE is an assurance whereby land is let to a person called the lessee, for some period less than that possessed by the person letting it, who is called the lessor. This letting may be for life, or years, or from year to year, or for any less period. It is unnecessary to here deal specially with leases for lives, as life estates in land have already been considered[1].

29 Car. II., c. 3.

By the Statute of Frauds, it is provided that all leases for years must be in writing, signed by the parties or their agents authorized in writing—except leases not exceeding three years from the making thereof and at a rent of not less than two-thirds of the full improved value—otherwise they shall have the force and effect of estates at will only[2]. And by the Real Property Act 1845, all leases thus required to be in writing must be by deed[3]. Any ordinary weekly, monthly, or yearly letting, therefore, or for any period not exceeding three years, is perfectly good, even though merely oral.

Clayton v. *Blakey*.

But although leases for more than three years, not by deed, are strictly void, and the tenant only holds at will, to simply state that fact, in answer to a question on the effect of such a lease, would be useless. The well-known case of *Clayton* v. *Blakey*[4] decides that, notwithstanding the statutes, if the

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[1] Ante, pp. 12-20.
[2] 29 Car. II., c. 3.
[3] 8 & 9 Vict., c. 106, sec. 3.
[4] (1798), 2 Smith's Leading Cases, p. 127.

tenant under such a lease enters and pays rent, it may serve as a tenancy from year to year. In the first instance, no doubt all the tenant has is a tenancy at will, in strict conformity with the statute; but the Court leans against such a tenancy, and in favour of a tenancy from year to year[1], and, therefore, it is afterwards converted into that. Further, if a tenant goes into possession under such a void lease, or holds over after the expiration of a valid lease (in which case he would be a tenant at sufferance), and pays rent referable to a year, or any aliquot part of a year, he will hold under the terms of the lease in other respects, so far as they are applicable to the new yearly tenancy[2].

Richardson v. *Langridge.*

Doe d. Rigge v. *Bell.*

A lease from year to year, or for a less period, is generally styled an agreement of tenancy, and it continues until it is determined by notice. A yearly tenant is entitled to, and must give a reasonable notice to quit, which has been held to mean half a year's notice[3], ending at the period at which his tenancy commenced[4]. If, however, it is a tenancy under the Agricultural Holdings Act 1908, a year's notice is necessary, expiring at the end of the current year of the tenancy, unless the parties agree in writing to the contrary[5]. If property is let for " a

Yearly and less tenancies.

[1] *Richardson* v. *Langridge* (1811), Tudor's Conveyancing Cases, 4.

[2] *Doe d. Rigge* v. *Bell* (1793), 2 Smith's Leading Cases, 119.

[3] As to the distinction between half a year's notice and six months' notice, see *Barlow* v. *Teal* (1885), 15 Q. B. D., 501; 54 L. J., Q. B., 564; 54 L. T., 63.

[4] The parties may, of course, agree on a longer or shorter length of notice, or on one to expire at any time, but must do so explicitly. Thus, where the agreement was for a yearly tenancy with three months' notice to quit, it was held that the notice must end at the time of year when the tenancy began (*Dixon* v. *Bradford Coal Co.* (1904), 1 K. B., 444; 73 L. J., K. B., 136; 90 L. T., 122). But an agreement to quit at any date on three months' notice is good (*Lewis* v. *Baker* (1906), 2 K. B., 599; 75 L. J., K. B., 848; 95 L. T., 10).

[5] 8 Edw. VII., c. 28, secs. 22, 45, replacing 46 & 47 Vict., c. 61, sec. 33. A notice under this Act may be served by registered letter (*Van Grutten* v. *Trevenen* (1902), 2 K. B., 182; 71 L. J., K. B., 544; 87 L. T., 344).

year, and so on from year to year," as there is first a tenancy for a year certain, and then a yearly tenancy, the letting cannot be terminated before the end of the second year. So where premises were let for one year certain, and so on from year to year, until determined by either party giving 28 days' notice to the other, it was held that the tenancy could not be determined by notice during the first year[1]. To determine a monthly, or a weekly tenancy, a reasonable notice is required[2], and the safest plan is to give a month's, or a week's notice, as the case may be, which will, no doubt, always be sufficient[3]. A notice to quit need not be couched in technical language; it is sufficient if it clearly conveys to the mind of the party to whom it is given that the party giving it does not desire that the relationship of landlord and tenant shall continue[4]. The notice must be to quit at the proper time[5], *e.g.*, if the tenancy begins at Christmas a notice to quit at Lady Day is bad[6]. The notice should expire on the last day of the year[7], but a notice expiring on the anniversary of the commencement of the tenancy has been held equally good with a notice expiring the day before[8]. Though a written notice to quit is always advisable, a parol tenancy may be determined by a verbal notice[9]. The notice may be given to the tenant personally, or left at his dwelling with his wife or servant, or posted, in which

Notice to quit.

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[1] *Cannon Brewery* v. *Nash* (1898), 78 L. T., 648.

[2] *Jones* v. *Mills* (1862), 31 L. J., C. P., 66.

[3] *Bowen* v. *Anderson* (1894), 1 Q. B., 164; 42 W. R., 236. An express agreement for a week's notice means seven clear days, so that a notice to quit on 24th November served at 10 a.m. on 17th November is bad (*Weston* v. *Fidler* (1903), 88 L. T., 769).

[4] *Bury* v. *Thompson* (1895), 1 Q. B., 696; 64 L. J., Q. B., 500; 72 L. T., 187; *Ahearn* v. *Bellman* (1879), 4 Ex. D., 201; 48 L. J., Ex., 861.

[5] *Doe* v. *Wilkinson* (1841), 12 A. & E., 743.

[6] *Doe* v. *Milward* (1838), 3 M. & W., 328.

[7] *Ackland* v. *Lutley* (1839), 9 A. & E., 879.

[8] *Sidebotham* v. *Holland* (1895), 1 Q. B., 378; 64 L. J., Q. B., 200; 72 L. T., 62; 43 W. R., 338.

[9] Woodfall's Landlord and Tenant, 401.

case the date of delivery is the date of service[1]. Where several premises are let under one common rent, notice to quit part only of them cannot be given[2] —except under the Agricultural Holdings Act 1908, which provides[3] that a landlord may give notice to quit part only of the demised premises in order to make certain improvements mentioned in the Act, but in this case the tenant will be entitled to compensation, and may, within 28 days, accept the notice for the entire holding. If a tenant holds under a lease, made by two or more joint lessors, they should properly all join in giving notice to quit, but notice to quit by one, on behalf of all, whether authorized by the others or not, will put an end to the tenancy[4]. If property is let to joint tenants, the notice to quit should be given by all, or by one on behalf of all with their authority[5]; but a notice given by the landlord to one is sufficient for all[6].

Notice to quit part of premises.

Joint lessors.

A tenant from year to year, or a less period, in the absence of agreement, is only bound to keep the premises wind and water-tight, and is not bound to do any general repairs, *e.g.*, to make good accidental fire, wear and tear, or the like, but an act arising from his own voluntary negligence he is liable for, *e.g.*, to replace broken windows[7]. On the other hand, the landlord, in the absence of agreement, is not bound to do any repairs.

Repairs.

If a furnished house (or apartments) be let for a short period, the Common Law implies a condition

Warranty of fitness.

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[1] Woodfall's Landlord and Tenant, 412, 413.
[2] Ibid., 403.
[3] 8 Edw. VII., c. 28, sec. 23, replacing 46 & 47 Vict., c. 61, sec. 41.
[4] Tudor's Conveyancing Cases, 26; *Doe* v. *Summerset* (1830), 1 B. & Ad., 135.
[5] *Re Viola* (1909), 1 Ch., 244; 78 L. J., Ch., 128; 100 L. T., 33.
[6] *Doe* v. *Watkins* (1806), 7 East., 551; *Doe* v. *Crick* (1805), 8 R. R., 848.
[7] Woodfall, 701, 702.

that it is fit for habitation at the commencement of the tenancy, as it is naturally intended for immediate occupation; so that if, by reason of defective drains, or the house (or apartments) being infected with some complaint or otherwise, it is not so fit, the tenant is justified in repudiating the agreement, and is not liable for the rent[1]. And this implied warranty only relates to defects which exist at the commencement of the tenancy[2]; and it is strictly confined to a furnished house (or rooms), so that it does not extend to a letting of a partly furnished house and land[3]. But the Common Law does not imply any condition or warranty as to the fitness for occupation of an unfurnished house or other premises[4]; so that if the tenant or his servants, customers, or guests suffer injury during the tenancy from the unsafe or unhealthy condition of the premises, no action will lie against the landlord[5]. However, by the Housing of the Working Classes Act 1890[6] in any contract made after 14th August, 1885, for letting for habitation by persons of the working classes a house or part of a house, there is implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation. This statutory implied condition cannot be excluded by an express contract[7]; but it only applies in England, if the annual letting rent does not exceed £20 in London, £13 in Liverpool, £10 in Manchester or Birmingham, and £8 elsewhere.

Wilson v. *Finch-Hatton*

Sarson v. *Roberts*.

Housing of Working Classes Act 1890.

[1] *Wilson* v. *Finch-Hatton* (1877), 2 Ex. D., 357; 46 L. J., Ex., 489; *Smith* v. *Marrable* (1843), 11 M. & W., 5; *Bird* v. *Lord Greville*, (1883), 1 C. & E., 317.

[2] *Maclean* v. *Currie* (1884), 1 C. & E., 361; *Sarson* v. *Roberts* (1895), 2 Q. B., 395; 65 L. J., Q. B., 37; 73 L. T., 174.

[3] *Chester* v. *Powell* (1885), 52 L. T., 722.

[4] *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D., 507; 49 L. J., C. P., 809; 29 W. R., 354; *Keates* v. *Earl Cadogan* (1851), 10 C. B., 591.

[5] *Lane* v. *Cox* (1897), 1 Q. B., 415; 66 L. J., Q. B., 193; 76 L. T., 135.

[6] 53 & 54 Vict., c. 70, sec. 75.

[7] 3 Edw. VII., c. 39, sec. 12.

Lease for definite term.

A lease for a fixed period of years requires no notice to quit—it ends naturally at the expiration of the term. In some cases a lease for a term of years is preceded by an agreement for the granting of such lease; and any agreement for a lease, for however short a period, must be in signed writing, under section 4 of the Statute of Frauds. Such an agreement requires to be stamped as a lease[1], for, possibly, the parties may rest on the agreement, and an actual lease may never be granted. If this is the case, for all practical purposes the tenant is in the same position as if a lease had been made[2]; his strict position, however, is that when he first enters into possession he is—notwithstanding his right to specific performance of the agreement, provided he has performed the conditions thereof on his part—merely a tenant at will, but that as soon as he pays an annual rent, or the proportionate part of an annual rent, he becomes strictly a tenant from year to year, on such of the terms of the agreement as are applicable to a yearly tenancy[3].

Walsh v. *Lonsdale.*

Different kinds of leases.

The most practically important lease to consider is an ordinary lease of a house for the purposes of occupation. Then there is a building lease, being when land is leased for the purpose of houses being built thereon, and a ground rent[4] is thus created. There is also an agricultural or farming lease. A mining lease may also be granted, and here a leading feature is the varying nature of the rent, it generally taking mainly the shape of a royalty on the output from the mine, and special and peculiar covenants

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[1] 54 & 55 Vict., c. 39, sec. 75.

[2] *Walsh* v. *Lonsdale* (1883), 21 Ch. D., 9; 52 L. J., Ch., 2; 46 L. T., 858.

[3] *Coatsworth* v. *Johnson* (1886), 55 L. J., Q. B., 220; 54 L. T., 520; *Swain* v. *Ayres* (1888), 21 Q. B. D., 289; 57 L. J., Q. B., 426; 36 W. R., 798. He can get relief against forfeiture as if he were an actual lessee, 55 & 56 Vict., c. 13, sec. 5.

[4] See ante, p. 115.

are here necessary, from the nature of the case. It is necessary to consider, somewhat, each of these different leases, and the simplest course appears to be to first discuss in detail an ordinary occupation lease, as, in doing that, much of the matter affecting other leases must necessarily be considered, and then, having done that, to specially note any particular points affecting the other leases we have mentioned. Before doing this, however, it may be well to remark that when there is an agreement for a lease, the kind of lease that will be granted must depend, to a great extent, upon the terms of the agreement. When there is no agreement, then the terms of the lease are entirely a matter for mutual discussion between the lessor's and the lessee's solicitors. The lease is prepared by the lessor's solicitor, and perused by the lessee's solicitor; and the general, though not universal, rule is that the entire costs of the lease (both lessor's and lessee's costs) are borne by the lessee[1], though the lessor must pay for his own counterpart.

Preparation and costs of lease.

We will now at once proceed to discuss in detail an ordinary occupation lease, and, for that purpose, a brief epitome of its contents may be useful:—

Epitome of lease.

1. Date and parties, lessor of the one part, and lessee of the other part.

2. Witnesseth that, in consideration of rent and covenants, the lessor demises.

3. Parcels or description of the property.

4. Habendum, stating period of lease.

5. Yielding and paying the rent at half-yearly or quarterly periods.

6. Lessee's covenants: (*a*) to pay rent, rates, and taxes; (*b*) to repair; (*c*) to permit lessor to enter to

[1] *Grissell* v. *Robinson* (1836), 3 Bing., N. C., 10; *Smith* v. *Clegg* (1858), 27 L. J., Ex., 300. The lessor is liable to his solicitor, but can recover from the lessee.

view state of repair; (*d*) to yield up at end of the term in good repair.

7. Condition of re-entry on non-payment of rent.
8. Covenant by the lessor for quiet enjoyment.

Other provisions may be inserted by mutual arrangement, *e.g.*, a covenant by the lessee to insure, or proviso for re-entry on breach of any covenants. But it is submitted that, if a person agrees to grant an occupation lease to contain "usual" covenants and conditions, the clauses 6, 7, and 8 above contain all the covenants and conditions that he can insist on having inserted[1]. In practice, however, it is not often that such an agreement is, in fact, entered into; for, if there is an agreement, it generally specifies the various covenants to be included in the lease, and, if there is no agreement, it is a matter of arrangement in the settlement of the draft lease, and the lessee's solicitor must be reasonable, or his client will, probably, not get a lease at all. There are, therefore, other covenants and conditions which are practically, though not technically, "usual," and, on this distinction, we will, before discussing the details of the lease, mention four points.

Usual covenants.

A lease, in practice, usually contains a covenant by the lessee to insure (and keep insured) the property in the joint names of the lessor and lessee, and other covenants incidental thereto, viz., to produce the policy and receipts for premiums, to lay out insurance money in rebuilding, and, if not sufficient, to make up the deficiency. Prudence dictates that some one should insure, and naturally the party to insure is he on whom the obligation to rebuild rests, and that is the tenant, under his general covenants to repair and yield up at the expiration of the term

I. Insurance

[1] Woodfall, 138-142, and cases there quoted.

in a good state of repair. Therefore, even if no covenant to insure is inserted, the tenant naturally does insure, for his own protection, and, this being so, there is no reason why there should be any objection raised to a covenant to insure being inserted, and, in practice, it is quite a usual covenant. Sometimes the insurance is, by the lease, agreed to be paid by the landlord, and the amount of the premium is reserved by way of further rent to be paid by the tenant. This gives the landlord the greater certainty that exists in paying the premiums himself, and entitles him to recover the amounts thus paid by distress. In effect, the tenant pays the insurance, but in a different way. Sometimes, however, and invariably in short lettings, such as for three years or under, it is not intended between the parties that the tenant shall pay for the insurance, and, where that is so, care must be taken to limit the agreement or covenant to repair by excepting damage occasioned by fire; and, in such a case, as a tenant under a general agreement or covenant to pay rent during the time will be liable to pay the rent, although the premises may be destroyed by fire, a limitation should be made excepting his liability to pay rent during such period as the premises may be uninhabitable by fire. When this limitation is not inserted, and a tenant is, therefore, liable to pay rent after the premises are burnt down, if the landlord has insured them the tenant can require the insurance money to be laid out in rebuilding[1]. But the tenant must serve notice to rebuild on the insurance company before it pays the lessor[2], as he cannot compel the lessor to lay out the money in rebuilding unless the lease so stipulates[3]. Any loss

Liability to pay rent though premises burnt.

[1] 14 Geo. III., c. 78, sec. 83.

[2] *Leeds* v. *Cheatham* (1827), 1 Sim., 146; *Lofft* v. *Dennis* (1859), 28 L. J., Q. B., 168.

[3] *Edwards* v. *West* (1878), 7 Ch. D., 858; 47 L. J., Ch., 463.

of rent during the period that premises are useless by reason of fire can be covered by an insurance; and it is advisable, when insuring a house, to insure not merely to cover the cost of rebuilding, but also to cover the loss of rent that will occur.

2. Covenant not to assign or underlet.

A lease very often contains a covenant not to assign or underlet the property without the consent in writing of the lessor, such consent not to be unreasonably or capriciously withheld, and a covenant in some such shape is almost invariably found in leases of good class property[1]. It is, therefore, a practically usual covenant, but not a technically usual one, should there be an agreement for a lease with usual covenants[2]. If a lessee's solicitor is perusing a draft lease containing a covenant, in any shape, not to assign or underlet, and his client has got an agreement for a lease with usual covenants, he should strike this covenant out. If, however, as is more probably the case, his client has no binding agreement for a lease, then he should act reasonably, and if the covenant is properly modified in the way we have indicated, he may let it pass; should it, however, be an absolute covenant not to assign or underlet without licence, then he must take care to insert modifying words, for otherwise, thereafter, the lessee may desire to assign and find himself absolutely in the power of an unreasonable landlord. If proper modifying words are used the tenant is secure, for if the lessor afterwards, on being applied to for his consent, unreasonably withholds or refuses it, the tenant may assign or underlet without such

Hampshire v. *Wickens.*

Treloar v. *Bigge.*

[1] Foa's Landlord and Tenant, 241-251.

[2] *Henderson* v. *Hay*, 3 B. C. C., 632; *Church* v. *Brown* (1808), 15 Ves., 208; *Hampshire* v. *Wickens* (1878), 7 Ch. D., 555; 47 L. J., Ch., 243; *Eadie* v. *Addison* (1883), 52 L. J., Ch., 80; 47 L. T., 533; *Bishop* v. *Taylor* (1891), 60 L. J., Ch., 556; 64 L. T., 529; *Re Lander & Bagley's Contract* (1892), 3 Ch., 41; 61 L. J., Ch., 707; 67 L. T., 521.

consent, and, in doing so, will not commit any breach of the covenant[1]. A lessor is not bound to give any reason for refusing a licence; but if he does give a reason for his refusal, or if he gives a licence on some condition, the lessee can bring an action for a declaration that the reason or condition is unreasonable, and that he can assign without the consent or free from the condition[2]. If a lease of licensed premises contains covenants by the lessee to reside on the premises and personally conduct the business and not to assign without licence, the lessor can properly refuse a licence to assign to a limited company[3].

Points hereunder.

A covenant not to assign without licence only applies to dealings with the property *inter vivos*, and not by will, or operation of law, *e.g.*, bankruptcy, in which case the trustee in bankruptcy of the lessee may disregard the covenant and assign without licence. It is, of course, a breach of such a covenant if the lessee assigns the property to trustees for his creditors under a deed of arrangement; but if, in such a deed, the lessee merely covenants to stand possessed of the property in such manner as the trustee shall direct, this is no breach of the covenant[4]. An executor or administrator to whom the lease passes on a lessee's death is bound by the covenant if the lessee covenanted for himself, his executors, and administrators. The covenant does not extend to a mere deposit of the lease by way of equitable security. If the covenant is merely not to assign,

Gentle v. *Faulkner*.

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[1] *Treloar* v. *Bigge* (1874), L. R., 9 Ex., 151; 43 L. J., Ex., 95; *Sear* v. *House Property Co.* (1880), 16 Ch. D., 387; 50 L. J., Ch., 77; 43 L. T., 531; *Andrew* v. *Bridgman* (1908), 1 K. B., 596; 76 L. J., K. B., 272; 98 L. T., 656.

[2] *Young* v. *Ashley Gardens, Limited* (1903), 2 Ch., 112; 72 L. J., Ch., 520; 88 L. T., 541.

[3] *Jenkins* v. *Price* (1908), 1 Ch., 10; 77 L. J., Ch., 41; 97 L. T., 734.

[4] *Gentle* v. *Faulkner* (1900), 2 Q. B., 267; 69 L. J., Q. B., 777; 82 L. T., 708.

it is not broken by making an underlease[1], and if it is merely not to let or demise, it is not broken by making an assignment of the whole term[2]. A covenant not to assign or underlet is broken by a mortgage by sub-demise, and the lease determines as soon as the lessor serves the lessee with a writ claiming possession[3].

No fine for licence to assign.

The Conveyancing Act 1892[4] enacts that a condition in a lease against assigning or underletting without licence shall (unless the lease expressly provides to the contrary) be deemed subject to a proviso to the effect that no fine, or sum of money in the nature of a fine, shall be payable for such licence. But a sum of money required by the lessor, as a condition for granting a licence, to be deposited by the lessee as security for performance of the remaining part of the building covenants in the lease, and which, in the event of performance, would be repayable, is not a fine, or money in the nature of a fine, within this enactment, as it is not to go irrevocably into the lessor's pocket[5]. And if the assignee of a lease chooses, as a condition for a licence to assign again, to enter into a personal covenant with the lessor to pay the rent during the residue of the term[6], or if the lessee voluntarily and without duress or fraud pays the lessor a sum of money for a licence to assign[7], each of these transactions is good, as the parties are quite at liberty to waive the proviso which the Act incorporates into the lease. If the lessor in

Re Cosh.

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[1] 2 Prideaux, 21.
[2] *Re Doyle & O'Hara* (1899), Ir. R., 113.
[3] *Serjeant* v. *Nash* (1903), 2 K. B., 304; 72 L. J., K. B., 630; 89 L. T., 112.
[4] 55 & 56 Vict., c. 13, sec. 3.
[5] *Re Cosh's Contract* (1897), 1 Ch., 9; 66 L. J., Ch., 28; 75 L. T., 365; 45 W. R., 117.
[6] *Waite* v. *Jennings* (1906), 2 K. B., 11; 75 L. J., K. B., 542; 95 L. T., 1.
[7] *Andrew* v. *Bridgman* (1909), 1 K. B., 596; 77 L. J., K. B., 272; 98 L. T., 656.

contravention of the section demands a fine or an increased rent as a condition of granting the licence, the lessee can get an order declaring he can assign without licence[1].

3. Covenant not to carry on trades, etc.

A lease frequently contains a covenant as to trading[2]. This may be an affirmative covenant that the lessee will carry on a specified business, or it may be a negative covenant, or the two may both appear. The negative covenant takes various forms: (1) not to carry on any trade or business whatever; (2) not to carry on specified trades; (3) not to carry on any noisome or offensive trade; (4) not to carry on any trade, or do or permit any act, which may grow to the annoyance of the lessor or the neighbours; or (5) to use as a private dwelling-house and for no other purpose. Covenants of this kind, though not technically usual, are very often met with. In a lease of property manifestly meant for private occupation, there should certainly be inserted a covenant prohibiting any trade or business being carried on, and providing that the premises shall be used only as a private dwelling, and under such language it has been held that it is an infringement to carry on a school or to receive lodgers[3]. Again, though a lessor may be willing to permit certain trades or businesses to be carried on, he may think certain other businesses might be detrimental to the future letting value of the property or to his other adjacent property, or to the neighbourhood generally, and he, therefore, prohibits them by the covenant. And often, in the case of a new building estate, the owner thinks that he can find tenants at a higher rent if he is able to assure each

[1] *Jenkins* v. *Price* (1907), 2 Ch., 229; 76 L. J., Ch., 507.
[2] Foa, 219-240.
[3] *Wickenden* v. *Webster* (1856), 25 L. J., Q. B., 264; *Hobson* v. *Tulloch* (1898), 1 Ch., 424; 67 L. J., Ch., 205; 78 L. T., 224; 46 W. R., 331.

tenant that he will be the only person carrying on a particular trade on the estate and that other tenants will be restricted. If the lessor covenants not to let any of the adjacent premises for a particular trade, he must observe the covenant[1]; although it will not prevent either the lessor or a purchaser from him using the property personally for that trade[1]. If, however, the lessor afterwards grants a lease of adjacent premises, containing a proper covenant against the particular trade, and that lessee breaks it, this is no breach of the lessor's covenant with the first lessee, who has no remedy against the tenant under the other lease[2]. *Ashby* v. *Wilson.*

Framing such a covenant.

Care should be taken, in framing a covenant against trades or businesses, to be very clear and explicit, and innumerable points on the construction of such covenants have from time to time arisen. The words "trade" or "business" are not synonymous, for though every trade is a business, every business is not a trade. Business means almost anything which is an occupation or duty, and not merely a pleasure[3], and if there is a covenant not to use premises for any "occupation or calling," it is broken though the occupation is charitable and not carried on with any view to profit[4].

Technical meaning of words.

Where particular occupations are restricted, it is sometimes necessary to consider whether the words had, at the date of the lease, an acquired or technical meaning, for, if so, they are only to be construed according to that then acquired technical meaning[5].

[1] *Brigg* v. *Thornton* (1904), 1 Ch., 386; 73 L. J., Ch., 301; 98 L. T., 327.

[2] *Ashby* v. *Wilson* (1900), 1 Ch., 66; 69 L. J., Ch., 47; 81 L. T., 480; 48 W. R., 105.

[3] *Rolls* v. *Miller* (1884), 27 Ch. D., 71; 53 L. J., Ch., 682.

[4] *Portman* v. *Home Hospitals Association* (1879), 27 Ch. D., 81; 50 L. T., 599.

[5] *London & Suburban Land Co.* v. *Field* (1881), 16 Ch. D., 645; 50 L. J., Ch., 549.

"Public-house," "ale-house," and "beer-house," have a technical meaning, but "beer-shop" has not, so that while a covenant not to use premises as a "beer-shop" generally prohibits the sale of beer in any manner whatever, a covenant not to use them as a "beer-house" is not broken by the sale of beer to be consumed off the premises. Nor is such a sale a breach of a covenant not to use the house "as a public-house for the sale of beer." A man does not necessarily infringe a covenant as to not carrying on a particular business because he deals in articles the sale of which is common to the trade he carries on and others, *e.g.*, if the covenant is not to carry on the trade of a confectioner, it is not a breach of the covenant for a grocer to sell a particular kind of sweetmeat in which a confectioner commonly deals. But a prohibited trade is a breach of the covenant, although not the principal trade, but ancillary to another; thus a refreshment bar in a theatre was held to be a breach of a covenant against the trade of a retailer of wine, spirits, and beer, though the principal business of the defendant was that of a theatrical manager[1].

4. Condition of re-entry.

It will be observed that, in our epitome of a lease, the condition of re-entry is only on non-payment of rent. It has been held that under a contract to grant a lease with usual covenants and conditions, the lessor is only entitled to a condition of re-entry on non-payment of rent, and not on breach of any of the other covenants[2]. In practice, however, the condition is usually made to apply to the breach of all covenants, and a proviso for re-entry if the lessee shall commit any breach of the covenants on his part

Hodgkinson v. *Crowe.*

Harman v. *Ainslie.*

[1] Redman & Lyon's Landlord and Tenant, 267; Woodfall, 757-766.
[2] *Hodgkinson* v. *Crowe* (1875), L. R., 10 Ch., 622; 44 L. J., Ch., 238; *Re Anderton & Milner* (1890), 45 Ch. D., 476; 59 L. J., Ch., 765 63 L. T., 332; 39 W. R., 44.

"to be performed" applies to breaches of negative covenants (*e.g.*, not to underlet) as well as breaches of affirmative covenants[1]. If there is no binding agreement, and the condition is inserted in this general shape, it should not be interfered with; but if there is a binding agreement for a lease with usual conditions, the lessee's solicitor is strictly entitled to modify such a general condition by restricting it to the non-payment of rent only.

Having now considered what are technically, and what are practically, "usual" covenants in an ordinary occupation or business lease, we will proceed to discuss the various parts of the lease.

Demise.

The operative word "demise" is generally used in a lease, and it implies a covenant for quiet enjoyment against lawful[2] interruption by anyone in the world, which implied covenant ceases with the estate of the lessor[3], and only applies after the lessee has been put into possession, and not during an *interesse termini*[4]. It also appears that the words "agrees to let," and any other words of letting, and even the bare relationship of landlord and tenant, imply a covenant for quiet enjoyment[5], which is limited to interruptions by the landlord and those claiming through or under him[6], but in other respects is like that implied by the word "demise." Thus, where a

[1] *Harman* v. *Ainslie* (1904), 1 K. B., 698; 73 L. J., K. B., 539; 90 L. T., 624.

[2] Not against wrongful interruptions, as there the lessee could sue the tortfeasor direct, per Chitty, J., in *Wallis* v. *Hands* (1892), 62 L. J., Ch., 586.

[3] *Adams* v. *Gibney* (1836), 6 Bing., 656; *Penfield* v. *Abbott* (1862), 32 L. J., Q. B., 67; *Schwartz* v. *Lockett* (1889), 61 L. T., 719; *Baynes* v. *Lloyd* (1895), 2 Q. B., 610; 64 L. J., Q. B., 787; 73 L. T., 250; 44 W. R., 328.

[4] *Wallis* v. *Hands* (1892), 60 L. J., Ch., 586.

[5] *Budd Scott* v. *Daniel* (1902), 2 K. B., 351; 71 L. J., K. B., 706; 87 L. T., 392; 51 W. R., 134.

[6] *Jones* v. *Lavington* (1903), 1 K. B., 253; 72 L. J., K. B., 98; 88 L. T., 223; 51 W. R., 151.

Markham v. *Paget.*

freeholder demised coal with power for the lessee to let down the surface, and afterwards by signed writing "agreed to let" a house, and during the tenancy the house was damaged by subsidence caused by working the coal, the tenant of the house recovered substantial damages from the freeholder[1].

A lease, in practice, usually contains an express covenant for quiet enjoyment, which does not cease with the estate of the lessor, but is restricted to interruptions by the lessor and anyone rightfully claiming from or under him. The express covenant is no protection against wrongful interruptions by strangers or third parties having no title[2], or against eviction by some person whose title is paramount to or adverse to that of the lessor[3]. Thus if a lessor of two houses sues for possession under a proviso for re-entry for breach of covenant as to one house, and gets possession under an execution in that action, the underlessee of the other house cannot sue his underlessor on the express covenant for quiet enjoyment, because, although the underlessor's breach of covenant gave rise to the lessor's right to eject the underlessee, the interruption to the underlessee's enjoyment was by a person claiming against (and not under) the underlessor[4]. An express covenant for quiet enjoyment excludes the implied covenant, for *expressum facit cessare tacitum.* The covenant is broken only when the covenantee is disturbed in his tenancy, and it is in every case a question of fact whether there has been a breach, the covenant being construed with reference to the transaction[5], and so as to give effect to what may reasonably have been supposed to have

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[1] *Markham* v. *Paget* (1908), 1 Ch., 697; 77 L. J., Ch., 451; 98 L. T., 605; in which the authorities are reviewed by Eady, J.

[2] *Young* v. *Raincock* (1849), 7 C. B., 310.

[3] *Lane* v. *Stephenson* (1838), 7 Sc., 69.

[4] *Kelly* v. *Rogers* (1892), 1 Q. B., 910; 61 L. J., Q. B., 604; 66 L. T., 582.

[5] See *Aldin* v. *Latimer, Clarke & Co.* (1894), 2 Ch., 437; 63 L. J., Ch., 601; 71 L. T., 119.

been intended by the parties[1]. The covenant for quiet enjoyment is not confined to turning the tenant out of possession. It extends to disturbance of occupation by physical interference as distinguished from disturbance of comfortable enjoyment by noise or acts amounting to a nuisance[2]. It includes cases of pouring water or sewage over the land let[3], swamping the demised mines so that the lessee cannot work them[4], building on adjoining property which belonged to the lessor when the lease was granted[5] so as to fill the demised house with smoke[6], or making the demised premises so hot that their physical enjoyment is sensibly affected[1], or depriving the tenant of a demised right of way. A railway company, which has acquired property subject to a lease, cannot be sued by the lessee on the covenant for quiet enjoyment in respect of acts done by them in the exercise, without negligence, of their statutory powers, and the only remedy for such acts is compensation under section 68 of the Lands Clauses Act 1845[7].

Parcels.

With regard to the parcels, there is nothing to be added to what has already been stated on that subject in our consideration of purchase deeds[8].

Habendum.

The habendum states the term of years granted, and it is not infrequent to find this limited by a subsequent proviso in the lease, inserted after the

[1] *Robinson* v. *Kilvert* (1889), 41 Ch. D., 88; 58 L. J., Ch., 392; 61 L. T., 60.

[2] *Jaegar* v. *Mansions Consolidated, Limited* (1903), 87 L. T., 690; *Jenkins* v. *Jackson* (1889), 40 Ch. D., 71; 58 L. J., Ch., 124; 60 L. T., 105.

[3] *Sanderson* v. *Mayor of Berwick* (1884), 13 Q. B. D., 547; 53 L. J., Q. B., 559; 51 L. T., 495.

[4] *Harrison* v. *Muncaster* (1891), 2 Q. B., 680; 65 L. T., 481; 40 W. R., 102.

[5] *Davis* v. *Town Properties Investment Corporation* (1903), 1 Ch., 797; 72 L. J., Ch., 389; 88 L. T., 665; 51 W. R., 417.

[6] *Tebb* v. *Cave* (1900), 1 Ch., 642; 69 L. J., Ch., 282; 82 L. T., 115; 48 W. R., 318.

[7] *M., S. & L. Ry. Co.* v. *Anderson* (1898), 2 Ch., 394; 67 L. J., Ch., 568; 78 L. T., 821.

[8] Ante, p. 375.

Proviso for determining lease.

condition of re-entry. Thus in a lease for 21 years we often find a right conferred upon the tenant (and sometimes, though not usually, also on the landlord), to determine the lease at the end of the first 7 or 14 years of the term, by giving to the lessor six calendar months' notice in writing, in which event the term granted is to cease.

Yielding and paying.

The words "yielding and paying" imply a covenant on the part of the lessee to pay the rent reserved, and in the manner in which it is reserved; and, indeed, any words indicative of the intention of the parties that a specified rent shall be paid, amount to an implied agreement on the part of the tenant to pay it. Notwithstanding this, a properly drawn lease invariably contains an express covenant to pay the rent at the time, and in the manner reserved, and this is advisable, for the tenant's liability under the implied covenant to pay rent determines on his assigning the property to another, whilst, under the express covenant, he remains liable during the whole term[1].

Distress.

As regards the lessor's power to enforce payment of his rent, he has by the Common Law a right to distrain for it. The subject of distress, its formalities, and the general law with regard to it, including the subject of things exempted from distress, are properly matters for consideration whilst studying Common Law[2], but some points in connection with the matter must, however, be mentioned here.

Indermaur's Common Law, 73-85.

Goods must be on demised premises.

A landlord can, primarily, only distrain on goods which are on the demised premises, but this power may be extended, by the terms of the lease, so as to

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[1] *Staines* v. *Morris* (1822), 1 V. & B., 11; Foa, 148-150. Whether the covenant be express or implied, 20 years' arrears are recoverable if the lease is under seal, and six years' arrears if it is not; see Woodfall, 611; ante, p. 219.

[2] Indermaur's Common Law, 73-85, 512a.

enable the landlord to distrain on other goods, *e.g.*, where a power was reserved to a lessor of a colliery to distrain upon chattels of the lessee in the demised colliery, or "any adjoining or neighbouring collieries," in which case, however, it was held that this power must be construed as limited to the demised colliery and such collieries only as might be, or become, connected with it by underground workings[1]. It was also held, in this case, that this special power of distress, being in respect of a genuine rent, was not a bill of sale[1]. By the Distress for Rent Act 1737[2], if a tenant fraudulently, or clandestinely, removes his goods after rent has become due, in order to avoid their being seized in a distress, the landlord may, if there is not a sufficient amount of other distrainable property left, within 30 days follow and distrain on the goods, if they have not been sold *bonâ fide* for value and without notice in the meantime[3]. A landlord is not, under this provision, justified in following and seizing, after the expiration of the tenancy, and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises, for this enactment only applies where the tenant is still in actual possession[4]. By the Common Law a landlord can only distrain whilst the tenancy is continuing, but the Landlord and Tenant Act 1709 now allows him to distrain within six months after the expiration of the lease, if his title still continues and the tenant is still in possession[5]. If, then, a tenancy expires and the tenant goes out of possession, there is no right to distrain on goods which are either on the demised

Re Roundwood Colliery Co.

Clandestine removal.

Gray v. *Stait.*

8 Anne, c. 14.

[1] *Re Roundwood Colliery Co.* (1897), 1 Ch., 373; 66 L. J., Ch., 186; 75 L. T., 641; 45 W. R., 324.

[2] 11 Geo. II., c. 19, secs. 1, 2.

[3] See hereon *Tomlinson* v. *Consolidated Credit Corporation* (1890), 24 Q. B. D., 135; 62 L. T., 162; 38 W. R., 118.

[4] *Gray* v. *Stait* (1883), 11 Q. B. D., 668; 52 L. J., Q. B., 412; 49 L. T., 288.

[5] 8 Anne, c. 14, secs. 6, 7.

premises or have been clandestinely removed. It is, therefore, a good plan to make the last quarter's or half-year's rent payable in advance and this is sometimes done. An executor or administrator of any lessor may distrain for rent in like manner as his testator or intestate might have done, but such distress must be within six months after the determination of the term or lease[1].

Executor or administrator may distrain.

Arrears landlord can distrain for.

A landlord may usually distrain for six years' arrears of rent. But if the tenancy is agricultural or pastoral or a market garden[2], by the Agricultural Holdings Act 1908[3] he can only distrain for one year's rent; though if the ordinary custom has been to defer payment of rent until the end of a quarter, or half-year, after it legally became due, then the rent is only deemed, for the purposes of distress, to have become due at the end of such quarter or half-year, and not at the date at which it legally became due.

Execution.

If a landlord distrains before the goods are taken in execution for a debt, he has a right to the full amount he is entitled to distrain for, out of the goods, notwithstanding the subsequent execution. But if the goods were seized in execution before he distrained, he has only a right to be paid one year's rent, if so much is due, before the goods are removed under the execution; and the sheriff is empowered to levy out of the goods, and pay the execution creditor, not only the amount of the execution, but also such one year's rent which he has had to pay the landlord[4]. If the premises are let at a weekly rent, the landlord's claim against an execution creditor is limited to four weeks' arrears of rent, and if the premises are let for any other period, less than a year,

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[1] 3 & 4 Wm. IV., c. 42, secs. 37, 38.
[2] 8 Edw. VII., c. 28, sec. 48.
[3] Ibid., sec. 28, replacing 46 & 47 Vict., c. 61, sec. 44.
[4] 8 Anne, c. 14, sec. 1.

his claim is limited to arrears of rent accruing during four such terms or times of payment[1]. The landlord has no right to more than this, as against an execution creditor who seized before the landlord distrained. In the event of bankruptcy of a tenant, a landlord has also an advantage over other creditors, it being provided that he may at any time, either before or after the commencement of the bankruptcy, distrain on the goods of the bankrupt for the rent due; but if such distress is levied after the commencement of the bankruptcy, it is available only for six months' rent accrued due prior to the order of adjudication[2]. It is, however, also provided that if a landlord distrains on the goods of a bankrupt within three months before the date of the receiving order, certain debts, to which priority is given in bankruptcy—*e.g.*, 12 months' rates and taxes, and wages of a clerk or servant during the previous four months, and not exceeding £50—shall be a first charge on the goods so distrained, or the proceeds thereof, but the landlord is then to have the same rights of priority as the person to whom such payment is made[3]. Bankruptcy.

The last-mentioned provision applies also, in the case of a company being the lessee, as regards a distress made within three months next before the commencement of the winding-up[4]. Further, it must be noticed that where a company which is being wound up was the original lessee, no distress can be levied without the leave of the Court[5], but it is otherwise if the company, whose goods are distrained Company.

[1] 7 & 8 Vict., c. 96, sec. 67.
[2] 46 & 47 Vict., c. 52, sec. 42, amended by 53 & 54 Vict., c. 71, sec. 28.
[3] 51 & 52 Vict., c. 62, sec. 1 (4).
[4] 8 Edw. VII., c. 69, sec. 209 (4), (5).
[5] 8 Edw. VII., c. 69, secs. 142, 211, replacing 25 & 26 Vict., c. 89, secs. 87, 163.

on, was only a sub-tenant or otherwise a stranger to the lessor[1].

Rates and taxes.

In considering the tenant's covenant to pay rates and taxes[2], it is advisable first to look at the position if there is no such covenant, which only happens on a letting of a most informal description. However,

Landlord's taxes.

in such a case, the rule is that the landlord must bear the property tax, tithe rent-charge, land tax, and sewers rate[3] (unless as to the last it is only for

Tenant's taxes.

ordinary or annual repairs), and the tenant must bear the poor rates, paving, watching, lighting, highway, and county and borough rates, general district rates, and similar impositions. Where the tenant is compelled to pay the land tax, or the sewers rate, he is entitled to deduct from his rent the amount so paid. The obligation to pay property tax cannot, even by contract, be thrown on the tenant, but if he pays it, as in practice he usually does, he is entitled to deduct it from his next payment of rent[4]. The obligation to pay tithe rent-charge cannot, even by contract, be thrown upon the tenant[5]. A varying proportion of the publican's licence duty paid by the licence holder on the renewal of an on-licence can always be deducted from the rent, provided that the sum deducted is in no case to exceed half the rent[6]. Except, then, in the case of the property tax, and the tithe rent-charge, and to a limited extent publican's licence duty, the question of

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[1] *Re Lundy Granite Co.* (1871), L. R., 6 Ch., 462; 40 L. J., Ch., 588.

[2] See generally Woodfall, Chap. XV.; Foa, 168-196; Redman & Lyon, 295-303.

[3] Under the Statutes of Sewers, 23 Hy. VIII., c. 5; 7 Anne, c. 10; 3 & 4 Wm. IV., c. 22; 4 & 5 Vict., c. 45; 12 & 13 Vict., c. 50; 24 & 25 Vict., c. 133; carried out by commissioners of sewers or by elective drainage boards; to provide arterial drainage for agricultural land.

[4] 5 & 6 Vict., c. 35, secs. 60, 73, 103.

[5] 54 Vict., c. 8.

[6] 4 Edw. VII., c. 23 (Licensing Act 1904), sec. 3 (3), and schedule 2.

who pays the rates and taxes may, and usually does, depend on the agreement of the parties. In lettings of small properties the landlord often, and almost always in the case of weekly tenancies, agrees to pay all the rates and taxes; but in an ordinary yearly tenancy, or a letting for a period on lease, the tenant almost invariably agrees to pay the rates and taxes, and such an agreement may be implied from appropriate words, *e.g.*, if there is a reservation of a "net" rent, or a rent "free of all outgoings." It is submitted that under an agreement for a lease with usual covenants a landlord is merely entitled to a bare covenant by his tenant to pay all rates and taxes, and not to the more extended covenant dealt with in the next paragraph.

Usual position.

A lessor's solicitor, in drawing the lease, will, naturally, as he is acting in the interests of the lessor, seek to throw as much in the way of liability as he reasonably can upon the lessee. It has, therefore, become the common practice to frame the covenant as to liabilities in respect of the property so as to make the lessee covenant "to pay and bear all present and future rates, taxes, charges, demands, outgoings, assessments, duties, and burdens whatsoever imposed on the demised premises, or on the owner or occupier in respect thereof, except landlord's property tax and tithe rent-charge." The effect of the additional words given in this covenant is very important, for, under them, all sorts of things are included and will fall on the tenant. Thus, under such a covenant, the tenant will be liable to recoup his landlord any expenses incurred by him in complying with an order made under the Public Health Act 1891 to abate a nuisance on the premises[1]; also the expense

Modern covenant as to liabilities beyond strict rates and taxes.

Smith v. *Robinson.*

[1] *Smith* v. *Robinson* (1893), 2 Q. B., 53; 62 L. J., Q. B., 509; 69 L. T., 434; 41 W. R., 588; *Foulger* v. *Arding* (1902), K. B., 700; 71 L. J., K. B., 499; 86 L. T., 488.

Wix v. *Ruston.*

Farlow v. *Stevenson.*

of paving a new street under the Metropolis Management Acts[1] or the Public Health Acts[2]; also the cost of reconstructing drains under the provisions of the same Acts[3]. It will be noticed that, in the above covenant, the words "charges, demands, outgoings, assessments, duties, and burdens" are used, and also "imposed on the demised premises, or on the owner or occupier in respect thereof." Having reference to the various decisions in connection with the matter[4] it is advisable, in the interests of the lessor, to use all these expressions. The word "burdens," standing even by itself is, no doubt, comprehensive, and includes most things, as does the word "duties," or the word "outgoings"; but the word "assessments" is not nearly so comprehensive. It must be remembered that there are certain works done by local and sanitary authorities, the costs of which are a personal liability upon the landlord in the first instance, and they, apparently, would not come in under any of the above expressions without the words "imposed on the owner." The lessor's solicitor, if he desires to throw everything upon the lessee, should frame the covenant in the wide manner above indicated, and then, indeed, it will be strange if there can be anything to be paid in respect of the premises for which the tenant can escape liability, except the property tax and the tithe rent-charge. But though the lessor's solicitor may draw the lease in this manner, it does not follow that the lessee's solicitor should

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[1] *Wix* v. *Ruston* (1899), 1 Q. B., 474; 68 L. J., Q. B., 298; 80 L. T., 168.

[2] *Weld* v. *Clayton-le-Moors Urban Council* (1902), 86 L. T., 584; *Greaves* v. *Whitmarsh* (1906), 2 K. B., 340; 75 L. J., K. B., 633.

[3] *Farlow* v. *Stevenson* (1900), 1 Ch., 128; 69 L. J., Ch., 106; 81 L. T., 581; 48 W. R., 213; *Stockdale* v. *Ascherberg* (1904), 1 K. B., 447; 73 L. J., K. B., 206; 90 L. T., 111; *Re Warriner* (1903), 2 Ch., 367.

[4] *Budd* v. *Marshall* (1881), 5 C. P. D., 481; 50 L. J., Q. B., 24; 42 L. T., 793; *Allum* v. *Dickinson* (1883), 9 Q. B. D., 632; 52 L. J., Q. B., 190; 47 L. T., 493; *Batchelor* v. *Bigger* (1889), 60 L. T., 416; *George* v. *Coates* (1903), 88 L. T., 48.

assent; and, at any rate, he should explain the exact position, and the possible effect of the covenant, to his client, the lessee, and advise him thereon, and take his instructions, before allowing the draft to pass with so wide a covenant in it, since the liability which the lessee may possibly incur may turn out to be a very serious one.

Repairs.

Should the lease contain no covenant to repair —which practically is never the case—then it is submitted that the lessee is, like an ordinary tenant from year to year, under no liability to do more than keep the premises wind and water tight[1]. The ordinary covenants in a lease, as to repairs, are comprehensive, comprising: (1) a general covenant to keep in repair during the term; (2) a particular covenant to paint the outside of the house every three years, and the inside every seven years; (3) a covenant to permit the lessor to enter to view the state of repair, and to duly repair specified defects within a certain time after notice thereof; and (4) a covenant to yield up in repair at the end of the tenancy. Under the covenants to repair generally, and to deliver up in good repair at the end of the term, it is not sufficient for the lessee merely to keep the premises in the same state of repair as they were in when the tenancy commenced, if they were then in bad repair. "Tenantable" or "good" repair means such repair as, having regard to the age, class, and locality of the premises, would make them reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to

Proudfoot v. *Hart.*

[1] The point turns on the construction of the Statute of Marlbridge (52 Hy. III., c. 23). According to *Yellowby* v. *Gower* (1855), 11 Ex., at p. 194; and *Davies* v. *Davies* (1888), 38 Ch. D., 489; 57 L. J., Ch., 1093; 58 L. T., 514; he is liable for permissive as well as voluntary waste; but the point is concluded by the express covenant in practically every case.

take them[1]. Thus if the premises are an old house, the tenant is only bound to keep it up as an old house[2], and is not liable for dilapidations due to lapse of time or the elements[2] or to some inherent defect or vice in the property[3]. And the same rule applies to a landlord who has covenanted to keep an old house in good repair[4]. It has already been pointed out that a tenant who has entered into a general covenant to repair and to yield up at the end of the term in repair, is liable to rebuild if the premises are burnt down[5]. In some cases a lessor covenants to do repairs, or some of the repairs, *e.g.*, to keep the outside of the house, and the roof, in good order; and where the landlord so covenants, the tenant must give him notice of any want of repair, so as to give him an opportunity of doing what is required, before the tenant is himself justified in doing it and deducting the amount from his rent[6].

Damages on breach of covenant to repair.

When a lessee fails to repair in accordance with his covenant, and the lessor sues for damages, the measure of damages is different according to whether the action is brought during the continuance of the tenancy or after it has determined. If it is brought whilst the lease is still running, the measure of damages is the real injury that has been done to the reversion[7]. Thus A, owning a freehold house, let on repairing lease to B, puts it up for sale, and

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[1] *Proudfoot* v. *Hart* (1890), 25 Q. B. D., 42; 59 L. J., Q. B., 389; 63 L. T., 171.

[2] *Gutteridge* v. *Munyard* (1843), 1 M. & R., 334.

[3] *Lister* v. *Lane* (1893), 2 Q. B., 212; 62 L. J., Q. B., 583; 69 L. T., 176; 41 W. R., 626; *Wright* v. *Lawson*, 68 J. P., 34.

[4] *Torrens* v. *Walker* (1906), 2 Ch., 166; 75 L. J., Ch., 645; 95 L. T., 409.

[5] Ante, p. 407.

[6] *Huggall* v. *M'Lean* (1886), 53 L. T., 94; 33 W. R., 588.

[7] Mayne on Damages, 280; *Whitham* v. *Kershaw* (1886), 16 Q. B. D., 613; 54 L. T., 124; 34 W. R., 340; *Ebbetts* v. *Conquest* (1900), 82 L. T., 561. See also and compare *Conquest* v. *Ebbetts* (1896), A. C., 490; 65 L. J., Ch., 808; 75 L. T., 36.

it fetches £1000. He may be able to shew that it only fetched this price because it had not been kept in repair by B, and that, had it been in proper repair, it would have fetched £1,200. The difference would be the true damage to the reversion. If, however, the action is brought, as is usually the case, after the lease has expired, then the measure of damages is, ordinarily, what it has cost, or will cost, to put the premises in proper repair in accordance with the covenant; and the lessor is under no obligation to expend the money in the repairs, and may equally recover, although it is evident he never will expend the money, *e.g.*, if it is shewn that it is his intention to pull the house down[1].

Position of tenant wrongfully holding over.

If a lessee fails to perform his covenant to yield up the premises at the end of the term, or, irrespective of the covenant, wrongfully holds on after the expiration of his tenancy, he becomes a tenant at sufferance, and incurs also certain statutory liabilities. If, on the proper termination of a lease or other letting, the landlord makes a demand in writing for possession, and the tenant still holds on, he is liable to pay double the yearly value of the premises, unless he had a *bonâ fide* belief that he had a right to so hold over[2]. The double value, being uncertain, cannot be distrained for, but can only be recovered by action. If a tenant gives notice to his landlord of his intention to quit, and does not quit at the proper time, he is liable to pay double the yearly rent of the premises[3], and this being certain can be distrained for. If a landlord gives notice to his tenant to quit, or pay an increased rent, and the tenant does not quit, an agreement on his part to pay the increased rent is implied.

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[1] Mayne on Damages, 286; *Joyner* v. *Weeks* (1891), 2 Q. B., 31; 60 L. J., Q. B., 510; 65 L. T., 16.

[2] 4 Geo. II., c. 28, sec. 1.

[3] 11 Geo. II., c. 19, sec. 18.

Condition of re-entry.

It has been pointed out that the condition of re-entry, in practice, almost invariably applies not merely in the case of non-payment of rent, but also as regards breach of any of the other covenants[1]. With regard to rent, the landlord has his Common Law power of distress, and he also has his right of action to recover the amount owing, but he would have no right to re-enter and determine the tenancy, were it not for the condition of re-entry. This right of re-entry for non-payment of rent is always, in practice, conferred if the rent is not paid within a certain time after it becomes due, usually 28 or 30 days; and in every well-drawn lease the words are inserted, "whether the same shall or shall not have been legally demanded."

Legal demand.

These special words are of considerable importance. They were not inserted in ancient leases, and occasionally even now we see a badly-drawn lease without any such words. The Common Law rule is, that before a landlord can take advantage of the condition of re-entry, he must go upon the demised premises by himself or his agent, and make a formal demand for the precise amount of the rent on the very day when it becomes due and payable. To obviate the need for this, the special words mentioned above should always be inserted. If, however, they are not inserted, the Common Law Procedure Act 1852[2] now provides that in every case where a landlord has a right of re-entry for non-payment of rent, if half a year's rent is in arrear, and no sufficient distress is to be found on the premises, the landlord may bring his action of ejectment and may recover judgment and execution, without first making a formal legal demand for the

Common Law Procedure Act 1852.

[1] Ante, p. 414.
[2] 15 & 16 Vict., c. 76, sec. 210.

rent. This statute is useful, therefore, when the proper special words have been omitted from the lease, but it should never be relied on in drawing a lease, for, firstly, the landlord may desire to re-enter before so much as half a year's rent is in arrear, and, secondly, he may desire to re-enter rather than to distrain; and, besides, it may happen that there are on the premises goods on which he might have distrained, although he was not aware of the fact.

Relief against forfeiture by non-payment of rent.

The condition of re-entry for non-payment of rent operating as a forfeiture, the Court of Chancery, from a very early time, gave relief in respect of it if the tenant sought its assistance within a reasonable time and paid the rent and all costs, the usual practice being not to grant relief after six months. This limit was afterwards fixed by statute[1], and, later on[2], a similar power was conferred upon the Courts of Law. A tenant, therefore, here has full protection, for if an action of ejectment is brought on the condition of re-entry, he can obtain relief in such action, and, if the landlord enters without action, he can make a substantive application for relief[3]. The statutory relief can be obtained by the lessee, or his assignee, or mortgagee, or other persons claiming under the lease. It can also be now obtained by an under-lessee under section 4 of the Conveyancing Act 1892[4]. The statutes limit the relief to six months, but it will be refused within the six months if there are circumstances which make it inequitable to give

Gray v. *Bonsall.*

[1] 4 Geo. II., c. 28, secs. 2-4, now superseded by 15 & 16 Vict., c. 76 (C. L. P. A., 1852), secs. 210, 211, 212.

[2] 23 & 24 Vict., c. 126 (C. L. P. A., 1860), sec. 1.

[3] *Howard* v. *Fanshawe* (1895), 2 Ch., 581; 64 L. J., Ch., 666; 73 L. T., 77.

[4] *London Bridge Buildings Co.* v. *Thomson* (1903), 89 L. T., 50; *Gray* v. *Bonsall* (1904), 1 K. B., 601; 73 L. J., K. B., 515; 90 L. T., 404.

relief, *e.g.*, if the landlord has re-let and the new tenant is in possession[1]. The law, as above set out, relating to re-entry or forfeiture for non-payment of rent and relief against such re-entry or forfeiture, is excluded from and in no way altered by section 14 of the Conveyancing Act 1881[2] (presently dealt with), and this must be carefully borne in mind.

No relief originally for breaches of other covenants.

But the condition of re-entry, ordinarily, is made to apply not only in case of non-payment of rent but also on breach of other covenants. The Court of Chancery, in exercising its original jurisdiction, never gave relief as regards a forfeiture for breach of any covenant other than payment of rent, but it acquired by statute a power of relieving in respect of the breach of a covenant to insure[3]. It is unnecessary to consider this point, as the whole subject of the rights under the condition of re-entry for breach of any covenant (other than rent) is now regulated by the Conveyancing Acts 1881 and 1892. Before 1882, therefore, we see the law to have been that, under the condition of re-entry, though primarily the lessee was liable to be ejected, yet relief could be given him in two cases, viz., rent and insurance, but in no other case; and the relief as to rent has not been altered.

Conveyancing Act 1881, sec. 14.

The Conveyancing Act 1881[4] provides in section 14 that a right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the

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[1] *Stanhope* v. *Haworth* (1886), 3 T. L. R., 34.
[2] 44 & 45 Vict., c. 41, sec. 14.
[3] 22 & 23 Vict., c. 35, extended to the Courts of Law by 23 & 24 Vict., c. 126, sec. 2.
[4] 44 & 45 Vict., c. 41, sec. 14.

particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, demanding compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach. Also that where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action (if any) or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief, as it thinks fit, or grant it on any terms it thinks fit. And these provisions apply to every lease, whether made before or after the Act, and even if the lease expressly says otherwise. But it is expressly enacted that these provisions shall not extend to: (1) A covenant or condition against assigning, underletting, parting with the possession, or disposing, of the land leased; (2) A condition for forfeiture on the bankruptcy[1] of the lessee, or on the taking in execution of the lessee's interest; or (3) A covenant or condition in a mining lease, allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mines or the workings thereof. And, as already pointed out, the section in no way applies to forfeiture or relief on non-payment of rent.

Proviso.

The foregoing provision gives a wide and beneficent protection to a lessee against the rights of the lessor under the condition of re-entry. Leaving out the subject of rent altogether, we find that, except in the three cases mentioned above, a lessor who wants to

Effect of this enactment.

[1] This includes voluntary liquidation of a company, 44 & 45 Vict., c. 41, sec. 2 (15); *Horsey Estate Co.* v. *Steiger* (1899), 2 Q. B., 79; 68 L. J., Q. B., 743; 80 L. T., 857; *Fryer* v. *Ewart* (1902), A. C., 187; 71 L. J., Ch., 433; 86 L. T., 242.

proceed under the condition must first give a notice[1], and even then the Court has power to relieve.

The notice.

As regards the notice required to be given, the Act shews what points it should be directed to, and a reasonable time must be allowed to elapse to enable these requirements to be complied with, such time depending, of course, upon what they are; and it is only after the expiration of this reasonable time that an action can be brought. A mere general notice to perform the covenants, or to do repairs, is not sufficient; the notice must plainly specify the matter complained of and the matter to be put right, and can leave the lessee to find out how he can best undo what he has done[2]. But it must give the lessee sufficient particulars to enable the lessee to see generally what he is required to do[3]. But a notice is not bad because some of the breaches therein mentioned prove not to be actual breaches, as a separate notice is not required for each breach alleged[4]. Although the Act says that the notice is to demand compensation, it has been decided that this is optional, and the notice is good without any such demand[5]. The notice should be given to all persons whom the lessor desires to eject, but a notice addressed to the original lessee, "and all others it doth or may concern," and served upon the occupier, has been held to be a sufficient notice to an assignee of the original lessee[6].

Fletcher v. *Nokes.*

Lock v. *Pearce.*

Service.

It is sufficient service of the notice if it is left at the last known place of abode or business of the lessee,

[1] Even before he can obtain possession peaceably without an action (*Re Riggs* (1901), 2 K. B., 16; 70 L. J., K. B., 541; 84 L. T., 428).

[2] *Piggott* v. *Middlesex County Council* (1909), 1 Ch., 134; 77 L. J., Ch., 813; 99 L. T., 662.

[3] *Fletcher* v. *Nokes* (1897), 1 Ch., 271; 66 L. J., Ch., 177; 76 L. T., 107; 45 W. R., 471.

[4] *Pannell* v. *City of London Brewery* (1900), 1 Ch., 496; 69 L. J., Ch., 244; 84 L. T., 53.

[5] *Lock* v. *Pearce* (1893), 2 Ch., 271; 62 L. J., Ch., 582; 68 L. T., 569; 41 W. R., 369.

[6] *Cronin* v. *Rogers* (1885), 1 Cab. & Ell., 348.

or other person to be served, or if it is affixed, or left for him, on the land or any house or building comprised in the lease, or sent by post in a registered letter addressed to the lessee or other person to be served, by name, at his last known place of abode, or business, office, or counting house, and the letter is not returned through the post undelivered[1].

Relief.

If the notice is duly complied with, there is no right for the lessor to re-enter; but if it is not, then there is, although the lessee can bring an action to obtain relief. An application for relief cannot be made by originating summons[2]. The Court has discretion to give or refuse relief, and will generally give it if everything that should have been done has been done, and provided the lessee pays any compensation for loss that may be proper and all the costs. The Act only enables the Court to give relief where the lessor "is proceeding," and, therefore, if after having given a proper notice, the landlord, by action or otherwise, obtains possession, the Court has no power to give any relief[3]. Under the Act of 1881, it was held that a sub-lessee could not obtain relief against forfeiture of the lease out of which his sub-lease was derived[4]; but this is now altered by the Conveyancing Act 1892, which enables the Court, on the application of a sub-lessee, to make an order vesting the property for the whole term of the lease, or any less term, in any person entitled as sub-lessee, on such terms as to costs, and generally, as the Court think fit[5]. The peculiar mode here provided for giving relief should be borne in mind and it should be

Rogers v. *Rice*.

Sub-lessee.

[1] 44 & 45 Vict., c. 41, sec. 67.
[2] *Lock* v. *Pearce*, ante, p. 432.
[3] *Rogers* v. *Rice* (1892), 2 Ch., 170; 61 L. J., Ch., 573; 66 L. T., 640; 40 W. R., 489.
[4] *Burt* v. *Gray* (1891), 2 Q. B., 98; 60 L. J., Q. B., 664; 65 L. T., 229.
[5] 55 & 56 Vict., c. 13, sec. 4. See *Ewart* v. *Fryer* (1901), 1 Ch., 499; 70 L. J., Ch., 138; 83 L. T., 551.

observed that a sub-lessee may be able to thus obtain relief, although the original lessee might not, under section 14 of the Conveyancing Act 1881, be able to obtain any relief[1]. Thus an original lessee cannot, as we have seen, obtain relief against forfeiture for breach of a covenant not to assign without consent; but under the Act of 1892, as it is not really an amending provision, but an independent enactment, the Court has jurisdiction to relieve a sub-lessee, in the way pointed out, from a forfeiture of the superior lease by breach of such a covenant[2].

Imray v. *Oakshette*

Costs of notice.

A lessor, in giving the necessary notice, must, ordinarily, incur some costs, *e.g.*, costs of a surveyor for inspecting the premises, and making a schedule of repairs to be done, and of a solicitor for preparing the notice. It was, however, held that these costs could not be recovered from the tenant as compensation, or otherwise[3]. To remedy this, the Conveyancing Act 1892 provides that a lessor shall be entitled to recover from a lessee all reasonable costs of a solicitor, or a surveyor, or otherwise, in relation to the breach of covenant giving rise to the right of re-entry or forfeiture, provided: (1) it is at the lessee's request waived by the lessor by signed writing, or (2) the Court gives relief against it[4]. The language of this enactment is unfortunate; and it has been held that it gives no right to recover any such costs if the lessee has complied with the notice, for in that case there is nothing either to be waived

Convey-ancing Act 1892, sec. 2.

Nind v. *Nineteenth Century Building Society.*

[1] *Warden of Highgate School* v. *Sewell* (1894), 2 Q. B., 906; 63 L. J., Q. B., 820; 71 L. T., 88.

[2] *Imray* v. *Oakshette* (1897), 2 Q. B., 218; 66 L. J., Q. B., 544; 76 L. T., 632; 45 W. R., 681. Whether the Court gives such relief or not is, however, a matter in its discretion, and in this case it refused to give relief, on the ground that the underlessee had been guilty of negligence in not inquiring into the superior title. See also ante, pp. 273, 274.

[3] *Skinners' Company* v. *Knight* (1891), 2 Q. B., 542; 60 L. J., Q. B., 629.

[4] 55 & 56 Vict., c. 13, sec. 2.

or relieved against[1], and, further, that no such costs can be recovered against an underlessee who is relieved[1]. A well-drawn lease should, therefore, contain an express covenant to pay such costs.

The exceptions in sec. 14 of Conveyancing Act 1881.

Dealing next with the three matters which are excepted in the Conveyancing Act 1881, and as to which no preliminary notice is necessary, and there is no power to give relief, in each of them some shew of reason can be found for making them exceptions. A lessor may reasonably have an absolute right to determine who shall be his tenant; and in the case of a mining lease, where the rent is paid by means of royalties, the covenant for the production of books and weighing machines is vital. Subject to the amending Act dealt with in the next paragraph, a breach of any of the three excepted covenants and conditions is absolutely fatal, so that where a lessee who had covenanted not to assign without licence, which was not to be withheld to a responsible assignee, inadvertently did assign without licence, though to a perfectly responsible person, the Court held there was no power to grant relief[2].

Barrow v. *Isaacs.*

Conveyancing Act 1892, sec. 2.

It is evident that the condition of re-entry in a lease, in the event of the tenant becoming bankrupt, or the lease being seized in execution (which is frequently inserted in leases of good class property), may sometimes work considerable injustice. Thus A purchases a leasehold house, paying £2000 premium, and the lease contains such a condition. Shortly afterwards, A becomes a bankrupt, and, under the Act of 1881, the lease is forfeited, and a valuable

[1] *Nind* v. *Nineteenth Century Building Society* (1894), 2 Q. B., 226; 63 L. J., Q. B., 636; 70 L. T., 831; 42 W. R., 481.

[2] *Barrow* v. *Isaacs* (1891), 1 Q. B., 417; 60 L. J., Q. B., 179; 64 L. T., 686; 39 W. R., 338; *Eastern Telegraph Co.* v. *Dent* (1899), 1 Q. B., 835; 68 L. J., Q. B., 564; 80 L. T., 453.

asset lost to A's creditors; or, again, X, a creditor of A, might seize the lease in execution, and, by reason of the condition of re-entry, lose the fruits of his proceedings. To remedy this, the Conveyancing Act 1892 has now provided that, in such cases, there shall be no forfeiture for the space of one year, and that if within that time the trustee in bankruptcy or the sheriff (as the case may be), sells the property, there shall not be any forfeiture at all, and thus the asset is preserved for the general body of creditors, or the particular creditor, as the case may be. But this amending provision is not general, for it excepts, and still leaves as before, leases of: (1) agricultural land; (2) mines or minerals; (3) public-houses; (4) furnished dwelling-houses; and (5) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or the character of the property, *e.g.*, a common lodging-house[1].

Smith v. *Gronow.*

Where a lease contains a condition of re-entry, if the lessee, his executors, administrators, or assigns should become bankrupt, and the lessee assigns, and afterwards becomes bankrupt, the condition of re-entry does not take effect, as it would have done if there had been no assignment. The intention is, that an approved assignee should take the same estate as that of the lessee, and accordingly, as the assignee has not become bankrupt, no forfeiture under the condition has been incurred[2].

We have been specially considering an ordinary lease for occupation or business purposes, but the major part of what has been stated is applicable more or less to all leases. Some few points remain to be

[1] 55 & 56 Vict., c. 13, sec. 2.
[2] *Smith* v. *Gronow* (1891), 2 Q. B., 294; 60 L. J., Q. B., 776; 65 L. T., 117; 40 W. R., 46.

noticed in connection with building leases, agricultural leases, and mining leases.

Building leases.

A building lease is a lease of land for the purpose of building, under which the lessee covenants to pay rent for the land for the term granted, and to erect a house or houses, and under which, at the end of the term, the lessor, if a freeholder, gets the land and the buildings thus erected. The rent thus created is called a ground rent, and the distinction between a freehold and a leasehold ground rent has already been explained[1]. The form and order of a building lease is the same as an ordinary lease, but it is generally granted for 99 years; it always contains a covenant to insure; the covenant in respect of outgoings should be framed in the widest manner; and there must be inserted all necessary and proper building covenants, *e.g.*, to fence, to build and complete the house or houses, not to erect other buildings without licence, to pay a proper proportion of the cost of making up roads, and to give the lessor notice of all assignments. The object of the lessor is to secure the erection of the house or houses, and the keeping of them in proper repair, so that he shall have his ground rent thoroughly secured to him, and that, if a freeholder, he, or rather his successors, shall have, at the end of the term, a substantial house, or houses, in possession.

Building agreements.

Very often a building agreement is entered into. This may take the form of a contract that when the buildings have been erected as agreed, the lessor will grant the lease or leases, and that meantime the builder shall only be a tenant at will, and that the lessor can determine the agreement on the builder's failure to complete the buildings. Another form is

[1] Ante, p. 115.

to give the builder a licence to enter on the land to erect the buildings and an agreement to grant a lease on completion of the buildings as agreed, with power for the lessor to determine the licence and re-enter on failure to complete the buildings. The object of such agreements is to encourage builders to develop the estate, so that when the leases are granted, they may either resell at a profit or sub-let for a premium and an increased rent; hence, it is generally stipulated that a separate lease shall be granted of each house as completed. Each building agreement generally specifies a time for completion of the buildings (with power for the lessor to extend it) and provides, that on the builder's failure to so complete, all building plant and materials brought on the land by the builder shall be forfeited to the landowner. This forfeiture clause cannot be made to take effect on the builder's bankruptcy, but it operates unless the trustee in bankruptcy performs the contract[1].

Farming lease.

Farming tenancies are for various periods, ranging from a yearly tenancy to 21 years, but rarely beyond that. A farming lease contains the ordinary provisions of any other lease, but it is usual also to insert in it special provisions with regard to cultivation, matters which vary very much in different parts of the country. The following covenants by the tenant may be specified by way of example: Not to mow for hay more than once a year; not to break up pasture land; to consume all hay, straw, etc., on the land; in the last year of the tenancy to sow arable land with wheat; to permit the incoming tenant in the last year of the tenancy to enter on the land to prepare for crops; to leave hay, straw and roots, at end of the tenancy, for the landlord

[1] *Re Garrard, Ex parte Newitt* (1881), 16 Ch. D., 522; 51 L. J., Ch., 381; *Re Keen* (1902), 1 K. B., 555; 71 L. J., K. B., 487; 86 L. T., 235.

or incoming tenant. The various covenants, however, depend, more than anything else, on the custom of the country, and the rules of the landowner; and, in the absence of express covenant, a custom of the country binds, though, if there is an express covenant on any particular point, that ousts the implied covenant, on the principle *expressum facit cessare tacitum*[1]. *Wigglesworth v. Dallison.*

But the Agricultural Holdings Act 1908[2], which came into operation on 1st January, 1909[3], now applies to every tenancy of any parcel of land which is wholly agricultural or wholly pastoral, or both, or wholly or partly cultivated as a market garden, unless it is let to the tenant during his continuance in any office, appointment, or employment held under the landlord[4]. This Act provides that if the contract of tenancy stipulates for a higher rent or for liquidated damages on breach of some provision by the tenant, the landlord cannot recover more than the actual damage caused to him by the breach; except for breach of a provision against breaking up permanent pasture, or grubbing underwood, or felling, cutting, lopping, or injuring trees, or about burning of heather[5]. The Act also provides[6] that—notwithstanding any custom of the country or any provision in the contract of tenancy—the tenant can practise any system of cropping arable land and can dispose of the produce of the holding, if he makes proper provision to protect the holding from injury or deterioration in the former case, and in the latter case returns to the holding the full equivalent manurial value of all crops sold or removed contrary to the custom or agreement; but this privilege does

Act of 1908.

Penal rent.

Freedom of cropping.

[1] *Wigglesworth* v. *Dallison* (1779),1 Smith's Leading Cases, 528.
[2] 8 Edw. VII., c. 28.
[3] Ibid., sec. 50.
[4] Ibid., sec. 48.
[5] Ibid., sec. 25.
[6] Ibid., sec. 26.

not apply to the year of quitting or after a notice to quit is served. Also, either landlord or tenant can compel a record of the condition of the holding to be made within three months after the tenancy begins[1].

Ground game.

The lease often contains a clause reserving to the lessor the right to kill and take game, and to shoot and fish, but subject, as to ground game, to the Ground Game Act 1880[2]. Under this Act every tenant has, as incident to, and inseparable from, his occupation, the right, either by himself or by persons duly authorized by him in writing, to kill, take, and sell ground game (*i.e.*, hares and rabbits) concurrently with any other person who may be entitled to kill and take the same, and every condition or agreement which purports to divest the tenant of this right is void[3]. This provision does not, however, apply to cases in which, at the time of the passing of the Act[4], the right of taking game was, for valuable consideration, vested in some other person[5]. This statute only applies to ground game, and as to other game the law is, that the right to that is in the tenant, unless it is reserved to the landlord or some other person[6]. It is, however, now provided[7] that if the tenant has not the right to kill and take deer, pheasants, partridges, grouse, and black game, and such "game" does damage exceeding one shilling an acre to his crops, the tenant (despite any contrary agreement) can get compensation from his landlord, provided he gives the landlord a notice in writing as soon as may be after he first observes the damage,

Other game.

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[1] 8 Edw. VII., c. 28, sec. 27.
[2] 43 & 44 Vict., c. 47.
[3] Ibid., secs. 1, 3, 4, 8.
[4] 7th September, 1880.
[5] Sec. 5.
[6] 1 & 2 Wm. IV., c. 32 (Game Act 1831), sec. 7.
[7] 8 Edw. VII., c. 28, sec. 10.

and a second notice in writing, giving particulars of his claim, within one month after the year in which the claim arose.

Compensation for improvements.

A tenant of a house or other property who makes improvements during his tenancy has no right at the end of his term to be compensated by his landlord in respect thereof, but it is otherwise with regard to tenancies coming within the provisions of the Agricultural Holdings Act 1908[1], that is agricultural, pastoral, or market garden holdings[2]. Under the 1908 Act "improvements" are divided into three classes. Class 1 comprises matters of a serious and expensive nature, such as erection, alteration, or enlargement of buildings, laying down of permanent pasture, works of irrigation, improvement of roads or bridges, making of fences, reclaiming waste lands. Class 2 comprises drainage. Class 3 comprises such matters as chalking, liming, and claying of land, and all kinds of artificial manurage, and consumption on the holding, by animals, of feeding stuff not produced upon the holding[3]. As regards improvements comprised in Class 1, the tenant is only entitled to compensation if the improvement has been made with the landlord's written consent. As regards improvements coming within Class 2, he is entitled to compensation if he has previously given notice to

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[1] 8 Edw. VII., c. 28, which repeals 46 & 47 Vict., c. 61; 58 & 59 Vict., c. 27, and 63 & 64 Vict., c. 50.

[2] The tenant of an allotment—*i.e.*, land not exceeding two acres cultivated as a farm or market garden for food or pleasure, but not for business—or of a cottage garden, is entitled on quitting to compensation for crops and fruit trees, labour and manure, drains and structural improvements, under the Allotments and Cottage Gardens Compensation for Crops Act (50 & 51 Vict., c. 26). Also by the Small Holdings and Allotments Act 1908 (8 Edw. VII., c. 36, sec. 47) the tenant of a small holding (not exceeding 50 acres) or of an allotment (not exceeding 5 acres) can claim compensation for improvements on quitting, either under that Act or (in case of allotments only) under the above-named Allotments and Cottage Gardens Compensation for Crops Act.

[3] 8 Edw. VII., c. 28, secs. 1-9, 13-20, 42, and schedule 1.

his landlord, in which case, if the landlord chooses, he may do the drainage work himself, and charge the tenant with interest on the outlay at the rate of 5 per cent. per annum, or with such annual sum, payable for 25 years, as will replace the outlay in that period, with interest at 3 per cent. per annum. No previous consent, or notice, is required as regards improvements coming under Class 3. Agreement may be come to as to what is to be paid for compensation, and, in the absence of agreement, the amount to be paid is fixed by arbitration; and payment is enforced after 14 days by order obtained in the county court. The tenant must claim compensation for any improvement before the expiration of his tenancy. A tenant cannot contract himself out of the benefits thus conferred upon him by this statute[1]; but the tenant may claim compensation to which he is entitled by custom, agreement, or otherwise instead of under the Act[2], and he can by written agreement substitute fair and reasonable compensation for improvements in Class 3 for his statutory right[3].

Fixtures.

Under the foregoing Act, an agricultural tenant has also certain special rights as to fixtures, and the position must be briefly explained. The old Common Law was expressed in the rule *Quicquid plantatur solo solo cedit*, and no fixtures could be removed; but this rule was gradually mitigated, and, by various cases, it was established that a tenant could remove any fixtures put up by him for the purposes of trade, ornament[4], and domestic use, *e.g.*, counters in a shop, chimney glasses, blinds, chimney pieces,

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[1] 8 Edw. VII., c. 28, sec. 5.
[2] Ibid., sec. 1 (3).
[3] Ibid., sec. 4.
[4] *Leigh* v. *Taylor* (1902), App. Ca., 157; 71 L. J., Ch., 272; 86 L. T., 239.

dressers in a kitchen, partitions, shrubs, and trees planted for sale. This is how the law stands now with regard to ordinary tenancies, and the fixtures must be removed before the expiration of the tenancy, and without doing damage to the premises. The case of *Elwes* v. *Mawe*[1], however, decided that agricultural fixtures could not be removed, and, as this worked hardship, it was, to a certain extent, remedied in the year 1851[2]; but the law on the subject of an agricultural tenant's right to remove fixtures put up by him is now governed by the Agricultural Holdings Act 1908[3], under which he has a full right, if he would not otherwise get compensation in respect of them, to remove any engine, machinery, fencing, or other fixture, and any building, erected by him since 1883 (and which he was not under an obligation to erect and did not substitute for one belonging to the landlord), not only during the tenancy but within a reasonable time thereafter, provided he first pays his rent, and performs his obligations, and does no avoidable damage, and makes unavoidable damage good, and gives one month's notice in writing to his landlord, who has a right of pre-emption. And this beneficial provision applies to a fixture or building acquired by a tenant after 1900 in the same way as if he had erected it.

Elwes v. *Mawe*.

Agricultural Holdings Act 1908.

In connection with agricultural leases may be mentioned a lease of a right of sporting. By it the right of shooting, fishing, etc., is demised by deed for a certain time, or from year to year, and there are usually certain special covenants, *e.g.*, by the lessee, to keep a gamekeeper, to preserve game and eggs;

Lease of right of sporting.

[1] *Elwes* v. *Mawe* (1803), 2 Smith's Leading Cases, 189.
[2] 14 & 15 Vict., c. 25, sec. 3.
[3] 8 Edw. VII., c. 28, sec. 21, replacing 46 & 47 Vict., c. 61, sec. 34; 63 & 64 Vict., c. 50, sec. 4.

and by the lessor, to allow the expenses of preserving, from the end of the preceding season, if there is a proviso to determine the tenancy on the lessee's death[1].

Mining leases.

A mining lease is, from its nature, somewhat peculiar. It is the mines, or beds of coal, or other minerals, which are leased, and not the surface of the lands under which they exist. The term varies, but is usually not more than 60 years. The lessee has full power given to him to sink pits, to win, work, and dispose of the minerals, to deposit the output from the mines on the land, and to appropriate any water on the land for the purposes of working the mines. Usually, there are two mineral rents, one a certain yearly rent, and the other an uncertain

Royalties.

rent, depending on what is got from the mines, *e.g.*, so much for every ton of coal; and there may also be a further rent reserved of so much per acre of the surface which is used by the lessee, and a wayleave rent for each ton of minerals brought through the lessor's mines from other mines. The tenant

Tenant's covenants.

covenants to work the mines skilfully, to fence all pits and shafts, not to work too near any buildings, to keep proper books of account and weighing machines and plans of the workings, and for the lessor to have access thereto, and also to pay compensation for injury to the surface, and to observe all statutory provisions as to mines. A power is usually reserved to the lessee to determine the lease should the mines become unworkable through no fault on his part. Generally, the clauses in a mining lease are very detailed, and they vary very much, according to the practice of mining in the particular part of the country. It is always advisable, and usual, to conclude with a clause submitting all matters in

[1] See precedent, 2 Prideaux, 168.

dispute to arbitration, under the provisions of the Arbitration Act 1889[1].

Lease of brickfield.

Somewhat similar to a mining lease, is a lease of a brickfield. The land is demised with the right to dig clay, etc., for the manufacture of bricks. There are usually two rents, the one certain, and the other in the nature of a royalty on the bricks manufactured. As to special covenants, the lessee, amongst other things, covenants not to use the land for any other purpose, to keep proper books of account, to carry on the works properly, to preserve trees, and to restore the surface to its original state, so far as practicable. An arbitration clause should also be inserted[2].

Lease of public-house.

A lease of a public-house may also be specially mentioned, as it contains certain peculiar covenants. Most frequently, such a lease is made by brewers. As special covenants by the lessee, inserted in such a lease, may be mentioned, covenants to use the premises as a public-house, to observe the licensing laws, to apply for renewals of licences, to deal exclusively with the lessors for beer, etc., and to transfer the licences at the end of the term. A power of attorney should also be given to the lessors to apply to magistrates for a renewal of the licences, and to do all necessary acts in connection therewith[3]. Where, by a lease, a publican is bound to take his beer, etc., from the lessor, the house is styled a "tied house," and it has been decided that such a covenant is not illegal, as being in restraint of trade[4].

Lease by limited owners.

The powers of leasing vested in a tenant for life, or other limited owner, or in trustees in the case of

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[1] See precedents, 2 Prideaux, 118-153.
[2] See precedent, 2 Prideaux, 154.
[3] See precedent, 2 Prideaux, 78.
[4] *Catt* v. *Tourle* (1869), L. R., 4 Ch., 654; 38 L. J., Ch., 665.

an infant entitled to land, have already been referred to[1]. Where the tenant for life, being *sui juris*, makes the lease, the benefit of the covenants entered into with him will be annexed, and incident to, and go with the reversion[2]. Where trustees make the lease they are made the parties of the first part to demise, and the infant is made the party of the second part, and the lessee of the third part; but the infant does not execute the lease, and is merely made a party because the lessee's covenants will be entered into with him[3].

Underlease.

If a person making a lease is himself only a leaseholder, he should take care in granting a sub-lease to make the sub-lessee enter into covenants similar to those which he has entered into in the lease under which he holds the property, but, of course, he may insert additional covenants.

Liability on covenants.

The general principles of liability on covenants in leases have already been referred to in treating of purchase deeds[4], and it has been pointed out that not only is the original lessee liable, but that an assignee (though not an underlessee) may, without any covenants on his part, become liable on many of the covenants, on the principle of privity of estate. Covenants to pay rent and taxes, to repair, to insure, and most of the ordinary covenants in leases, come under this head, and bind the assigns, although they are not expressly mentioned, for they touch, or concern, something *in esse* at the date of the

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[1] Ante, pp. 176, 177. The powers of ecclesiastical bodies to grant leases are regulated by various Acts of Parliament, the general effect of which is to prohibit leases for more than 21 years, or three lives (except as regards houses in towns which may be leased for 40 years), and any incumbent must, in making a lease, obtain the confirmation of the patron and ordinary (2 Prideaux, 57).

[2] 44 & 45 Vict., c. 41, sec. 10.

[3] 2 Prideaux, 74.

[4] Ante, pp. 380, 381.

covenant and parcel of the demise. A strong example of a covenant running with leasehold land, and binding on the assignee, is *Clegg* v. *Hands*[1], where it was held that a covenant in the lease of a public-house not to buy beer, etc., of any other persons than the lessors, bound the assignee of the lease. Where, however, a lessee covenanted that he would deal exclusively with the "lessor or his firm, or his or their successors in business," and the lessor, who was a brewer, sold the premises, subject to the lease, to another brewer, but still continued to carry on business, it was held that, under the words of the covenant, the lessee was under no obligation to take his beer of the purchaser[2].

Clegg v. *Hands.*

Birmingham Breweries v. *Jameson.*

If a lessee enters into an absolute covenant in the lease, he is liable to the lessor for a breach by his assignee or underlessee[3] or the assignee of the underlessee[4]. And if the lessee's covenant is absolute and runs with the land under *Spencer's Case* (ante, p. 380), the assignee of the lease is liable for a breach by his underlessee[4]. But if the covenant is not to do or suffer some act to be done, the lessor cannot sue the lessee if his assignee breaks the covenant[5], or the assignee[6] or underlessee[7] if his tenant against his will breaks the covenant[7], though he can always get an injunction against the actual occupier who breaks the covenant[8].

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[1] (1890) 44 Ch. D., 503; 59 L. J., Ch., 477; 62 L. T., 502; 38 W. R., 433. See also *White* v. *Southend Hotel Co.* (1897), 1 Ch., 767; 66 L. J., Ch., 387; 76 L. T., 273.

[2] *Birmingham Breweries* v. *Jameson* (1898), 67 L. J., Ch., 403; 78 L. T., 512.

[3] *Palethorpe* v. *Home Brewery Co.* (1906), 2 K. B., 5; 75 L. J., K. B., 555; 94 L. T., 871.

[4] *Mumford* v. *Walker* (1901), 85 L. T., 518; 71 L. J., K. B., 19.

[5] *Clements* v. *Wells* (1865), 1 Eq., 200; 35 L. J., Ch., 265.

[6] *Bryant* v. *Hancock* (1899), A. C., 442; 67 L. J., Q. B., 889; 81 L. T., 96; *Wilson* v. *Twamley* (1904), 88 L. T., 803.

[7] *Hall* v. *Ewin* (1887), 37 Ch. D., 74; 57 L. J., Ch., 95.

[8] *Parker* v. *Whyte* (1863), 1 H. & M., 167; *Clements* v. *Wells*, supra; *Mander* v. *Falcke* (1891), 2 Ch., 554; 65 L. T., 203.

Benefit of covenants runs with reversion.

So far we have been noticing the liability on covenants running with the land, but it must also be noticed that the benefit of covenants runs with the reversion. This seems not to have been so at Common Law, but it was made so at a very early date[1], and this provision has now been supplemented by the Conveyancing Act 1881, which provides[2] that rent reserved by a lease made since 1881, and the benefit of every covenant therein having reference to the subject matter thereof and on the lessee's part to be observed and performed, and every condition of re-entry, and other condition, shall go with the reversionary estate in the land expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part (as the case may require) of the land leased. Under this provision a mortgagor in possession, subject to a lease granted before the mortgage, can sue the lessee in his own name and without joining the mortgagee, for damages for breach of the lessee's covenant to repair[3]. The Act also contains[4] a similar provision as to the obligations of a lessor's covenant, making the liability pass, in like manner, to an assignee of the reversion.

32 Hy. VIII., c. 34.

Conveyancing Act 1881.

Turner v. *Walsh.*

Licence and waiver.

There is nothing to prevent a lessor giving his tenant a licence to commit a breach of a covenant contained in the lease, or waiving his rights in respect of such breach after it has been committed. At Common Law, however, if a landlord gave a licence to his tenant to commit a breach of covenant,

Dumpor's Case.

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[1] 32 Hy. VIII., c. 34, passed soon after the dissolution of monasteries, when the benefit of so many leases passed into the hands of grantees from the Crown.

[2] 44 & 45 Vict., c. 41, secs. 10, 12.

[3] *Turner* v. *Walsh* (1909), 2 K. B., 484 ; 78 L. J., K. B., 753.

[4] 44 & 45 Vict., c. 41, sec. 11.

or knowingly waived the breach, he altogether destroyed his right of re-entry[1]. The ground of this extraordinary doctrine was, that every condition of re-entry is entire and indivisible. It is, however, now provided that every licence to commit a breach of covenant shall, unless otherwise expressed, extend only to the permission actually given, or the actual matter thereby specifically authorized to be done, unless otherwise specified[2]; and also that any actual waiver of a breach of covenant shall not be deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear[3].

22 & 23 Vict., c. 35, sec. 1.

23 & 24 Vict., c. 38, sec. 6.

Surrender.

A leaseholder may, by deed, surrender his lease to the lessor, when it becomes extinguished by merging in the reversion. Where a lease is thus surrendered, the surrender is usually indorsed on the lease. A surrender may also be effected, by operation of law, viz., by the lessee accepting a new lease, commencing immediately, or which is otherwise inconsistent with the continuance of the first lease; or by the lessee assenting[4] to the granting of a new lease to a third person, inconsistent with the continuance of his own tenancy; or by the lessee giving up possession of the premises to the lessor under a mutual arrangement that the tenancy shall end[5]. The surrender which is implied from the acceptance of a new lease is subject to the implied condition that the new lease is valid[4]. The lessee, notwithstanding the surrender of his lease by operation of law, retains an interest in

[1] *Dumpor's Case* (1603), 1 Smith's Leading Cases, 32; Indermaur's Common Law Cases, 7.

[2] 22 & 23 Vict., c. 35, sec. 1.

[3] 23 & 24 Vict., c. 38, sec. 6.

[4] An oral assent will not do unless possession is given up to the new tenant (*Wallis* v. *Hands* (1893), 62 L. J., Ch., 586).

[5] 2 Prideaux, 36, 37.

the document, and is entitled to retain possession of the old lease on the lessor granting him a new lease[1]. If a lessee becomes bankrupt, the lease passes to his trustee in bankruptcy, who may, if he thinks fit (but in some cases only with the sanction of the Court), disclaim the lease, and put an end to further liability, leaving the lessor to prove against the bankrupt's estate for any loss occasioned to him by the disclaimer[2].

Disclaimer.

[1] *Knight* v. *Williams* (1901), 1 Ch., 256; 70 L. J., Ch., 92; 83 L. T., 730.

[2] Ringwood's Bankruptcy, 149-157.

CHAPTER XIV.

MORTGAGES.

A MORTGAGE may be described as a security whereby the legal or equitable ownership of land or other property is transferred or passed by one person to another conditionally as a security for the payment of money. There may be a mortgage of freehold, copyhold, or leasehold property, or of chattels, the security in this last case being usually styled a bill of sale; and, in fact, any property capable of being absolutely disposed of is also capable of being mortgaged. Bills of sale have little to do with conveyancing, and form a more fitting study in connection with the subject of bankruptcy, but there are, nevertheless, some matters in connection with them which cannot altogether be passed over here, and they will be briefly dealt with towards the close of this chapter. What is a mortgage?

Freehold property is mortgaged by means of a deed, of which the following is a short epitome :— Mortgage of freeholds.

1. This indenture made between the mortgagor, or borrower, of the one part, and the mortgagee, or lender, of the other part.

2. Recitals, both narrative and introductory, if desired, the introductory recital stating that the mortgagee has agreed to lend, etc.

3. Witnesseth that in consideration of the money lent, the receipt of which is acknowledged, the mortgagor covenants to repay the same on a given day (usually six months from date), with interest at a certain rate, and if not then paid, to continue to pay interest half-yearly, or quarterly, until repayment.

4. Witnesseth also that in consideration of the money lent, the mortgagor, as beneficial owner, conveys.

5. Parcels or description of the property conveyed.

6. Habendum unto and to use of mortgagee in fee simple.

7. Proviso for redemption on payment of principal and interest on a day named, usually six months from date.

8. Covenant to insure, if the property mortgaged comprises any buildings, and any other special clauses and covenants that may be arranged.

9. Conclusion. In witness, etc.

Here we have (*a*) covenants for payment in clause 3, which give a right of personal action against the mortgagor, and (*b*) in clauses 4 to 7, substantially an ordinary conveyance, with a clause under which the mortgagor is to have his property back if he repays the mortgage money, with interest, on the day named[1]. The separate covenant to pay interest should never be omitted, as it enables the mortgagee to sue for interest without calling in his principal, and (after judgment for his principal and interest in a personal action on the covenant) to still enforce the agreed rate of interest against the mortgaged property[2].

Mortgage of copyholds.

Copyholds are mortgaged in the following manner: Firstly, there is a deed executed containing similar covenants for payment of principal and interest, and also containing a covenant to surrender the property to the use of the mortgagee, subject to a condition making void the surrender on payment on the day

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[1] For precedent, 1 Prideaux, 587.

[2] *Economic Life Assurance Society* v. *Usborne* (1902), A. C., 147; 71 L. J., P. C., 34; 85 L. T., 587.

named. This is followed by a conditional surrender[1] to the mortgagee, under which he has a right, if he thinks fit, to be admitted. In practice, the mortgagee is not admitted unless and until he desires to enforce his security. The advantages of a conditional surrender are: (1) Until admittance, the mortgagor remains tenant[2], and the mortgagee is not liable for the rents, heriots, and services; (2) The fees and fines due on admittance are saved; and (3) When the money is paid off, the mortgage may be put an end to by entering up satisfaction on the court rolls. Under the deed, the mortgagee has all the powers of a mortgagee by deed hereinafter mentioned. The mortgagee has, in substance, just as good a security as if he were admitted, as he has the right at any time to be admitted[3].

Mortgage of leaseholds.

There are two ways of mortgaging leasehold property, viz.: (1) By assignment of the whole term vested in the mortgagor[4]; and (2) By a demise of something less than the whole term vested in the mortgagor, *e.g.*, the whole term less the last day thereof[5]. If the lease does not contain any heavy rent, or onerous covenants, the better course is to mortgage by assignment, for then the mortgagee has in him the whole term, and no difficulty can occur in the case of the mortgagor's bankruptcy, which might be the case were the mortgage by demise and the trustee in bankruptcy disclaimed, as in that event it might be necessary for the mortgagee to apply for a vesting order, to secure the whole term to himself,

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[1] The condition is that the surrender is to be void on payment of the amount of the loan and interest on a stated day.

[2] *Doe* v. *Wroot* (1804), 5 East, 132; *R.* v. *Mildmay* (1833), 5 B. & Ad., 234.

[3] For precedent, 1 Prideaux, 595, 596, 731; 2 K. & E., 79, 80.

[4] For precedent, 1 Prideaux, 599.

[5] For precedent, 1 Prideaux, 597. As a strong illustration of the advantage of taking a mortgage by demise, see *Hand* v. *Blow* (1901), 2 Ch., 721; 70 L. J., Ch., 687; 85 L. T., 155.

and prevent it revesting in the lessor[1]. If, however, there is any heavy, or even substantial, rent reserved by the lease, or there are any onerous covenants, then it is better to mortgage by a demise of the whole term, less the last day or last few days thereof, because if the mortgage is made in this way the mortgagee cannot be directly liable to the lessor for breaches of covenant, as he would be under a mortgage by assignment, on the principle of the covenants running with the land[2]. For this reason it is generally stated that the preferable mode of mortgaging leaseholds is by demise, or underlease, and not by assignment; yet, unless there may be some substantial liability, there does not seem any adequate reason for taking the mortgage by underlease, and the doing so sometimes may lead to inconvenience, as regards the day, or days, of the term left in the mortgagor.

Form of mortgage of leaseholds.

The substance of a mortgage of leaseholds is similar to that of a mortgage of freeholds, the usual plan, however, as regards leaseholds, being adhered to, of reciting the lease, and describing the property in the parcels by reference to the description in the recited lease. If, however, the mortgage is made by demise, then a special clause has to be inserted with regard to the last day, or days, of the term left in the mortgagor. A common clause often inserted is a declaration by the mortgagor that, on any sale by the mortgagee under his power of sale, he will stand possessed of the remainder of the term in trust for the purchaser. Then on a sale, a special condition should be inserted providing that any purchaser shall be satisfied with thus only acquiring an equitable interest in the last day or days. The only defect in the clause is that if the mortgagee forecloses,

[1] Ringwood's Bankruptcy, 149-157.
[2] Ante, p. 380.

there is no right in him to such last day or days, which, however, is not generally a matter of much importance. However, a more scientific and perfect plan, which should always be adopted, is to declare the mortgagor a trustee of the excepted last day or days of the head lease for the mortgagee, and give the mortgagee an irrevocable power of attorney[1], enabling him to assign and deal therewith, and also to at any time remove the mortgagor from being a trustee, and to appoint a new trustee and vest the head lease in him[2].

Statutory mortgage.

A mortgage of freehold or leasehold property may, if desired, be somewhat shortened, since the Conveyancing Act 1881, by adopting what is known as a "statutory mortgage"[3]. The only advantage of a statutory mortgage, if indeed it can be called an advantage, is the saving of a few lines; on the other hand, it has the disadvantage that on the face of the instrument the true contract is not disclosed. A statutory mortgage must commence as follows: "This Indenture made by way of statutory mortgage," and the following matters are then implied therein: (1) A covenant to pay principal and interest on the day named, and, if not then paid, to continue to pay interest half-yearly until repayment; (2) A proviso for redemption.

Position of mortgagor at Law and in Equity.

By the mortgage, whatever shape it takes, the property is vested in the mortgagee, subject to a clause called the proviso for redemption, under which the mortgagor is to have the property re-conveyed to him if he repays the money with interest on the given day. This is an estate upon condition,

[1] Being for value, it may be thus made irrevocable. See ante, p. 349.

[2] See hereon *London & County Bank* v. *Goddard* (1897), 1 Ch., 642; 66 L. J., Ch., 261; 76 L. T., 277; 45 W. R., 310. For precedent, 1 Prideaux, 598.

[3] 44 & 45 Vict., c. 41, sec. 26.

and, by the old Common Law, it was necessary for the mortgagor to strictly observe the day, otherwise he lost the estate. Equity, however, acting on the maxim "Equity regards the spirit and not the letter," always allowed the mortgagor to redeem the property, though the day agreed on had gone by, and this is styled the mortgagor's equity of redemption. By the mortgage the estate is vested in the mortgagee, but, until the day for repayment, the mortgagor has an actual estate upon condition, recognized at law; after the day for repayment has passed, the mortgagor has no longer any estate at law vested in him, but he has an equitable right to redeem. Since the Judicature Acts made equitable rules prevail over legal rules where there had previously been a conflict between them, the distinction is not of much practical importance, but for some purposes, as will be seen hereafter, it is necessary to bear it in mind. It must, however, be clearly recognized that the moment a mortgage deed is executed, the legal estate in the property is vested in the mortgagee, who, therefore, in strictness, is entitled to possession, unless the contrary is provided. It is not usual to so provide, the mortgagor being content to rely on the mortgagee in this respect, for it is not likely that a mortgagee would wish to take possession, at any rate until his money was due. Yet circumstances under which he might desire to take possession may well be imagined, *e.g.*, to prevent some forfeiture, when the mortgagor has abandoned or neglected the property.

How mortgagor may lose his equity of redemption.

A mortgagor's right or equity of redemption is an inseparable incident to every mortgage, and he cannot be deprived of it by an express covenant, or stipulation, in the mortgage[1]. There is, however, nothing

[1] Post, p. 463.

to prevent the mortgagor subsequently selling his equity of redemption to the mortgagee, if the transaction is fair, and not brought about by pressure[1]. Beyond this, a mortgagor may, however, lose or be deprived of his equity of redemption in any of the following ways :—

1. By foreclosure[2].

2. By the mortgagee selling the mortgaged property, but here the mortgagor will be entitled to an account and to any surplus[3].

3. By lapse of time, under the Real Property Limitations Act 1874, *i.e.*, by the mortgagee going into possession and holding for 12 years without giving any signed acknowledgment of the mortgagor's right to redeem[4].

4. By the mortgagor giving a second legal mortgage without disclosing by signed writing the prior mortgage[5].

Persons lending money on a joint account.

Very frequently, two or more persons together become mortgagees, and particularly is this so when trustees invest money on mortgage[6]. Although, when property is purchased by two or more persons, and simply conveyed to them, they always become joint tenants[7], yet in the case of a mortgage, this was not so, as Equity, acting on the maxim, "Equality is Equity," always held them to be tenants in common[8]. This was inconvenient, because if one died, and then the mortgagor repaid

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[1] *Reeve* v. *Lisle* (1902), A. C., 461; 71 L. J., Ch., 768; 87 L. T., 308.
[2] Post, p. 485.
[3] Post, p. 489.
[4] Ante, p. 211.
[5] 4 & 5 Wm. & M., c. 16; *Kennard* v. *Futvoye* (1860), 29 L. J., Ch., 553.
[6] In this case it is never stated in the mortgage deed that they are trustees, as this might throw a duty on the mortgagor to see as to their position on repayment of the mortgage money (*Re West & Hardy*, ante, p. 69).
[7] *Morley* v. *Bird* (1798), Tudor's Conveyancing Cases, 263.
[8] *Lake* v. *Gibson*, *Lake* v. *Craddock* (1729), 2 Wh. & Tu., 952.

the money, although the surviving mortgagee could reconvey the legal estate, it was necessary for the personal representatives of the deceased mortgagee to join in order to give a valid receipt for the mortgage money. To obviate this, it was always the practice, when money was advanced on mortgage by two or more persons, to express in the deed that the money was advanced by them on a joint account at Law and in Equity, and that the receipt of the survivors, or survivor, should be a sufficient discharge. No such clause is necessary now, as the Conveyancing Act 1881 provides[1] that when two or more persons advance money on mortgage, and it is expressed to be advanced by them on a joint account, or the mortgage is made to them jointly and not in shares, the receipt of the survivors, or survivor, shall always be a sufficient discharge. Under this provision no special words whatever appear necessary, but to avoid any doubt it is still usual, in a mortgage to two or more persons, to express in the receipt that the money is advanced by them on a joint account. The result, either of the clause, or the Act, is, that the mortgagor is always safe in paying to the survivors, or survivor, and taking a receipt and reconveyance from them or him; but this does not alter the fact that as between each other, unless they are trustees, the mortgagees are tenants in common, and that there is no accrual of interest by reason of death[2]. Thus A mortgages his property to X and Y for £1000, of which X advances £500 and Y £500, and X dies. A can, if the money is expressed to be advanced by X and Y on a joint account, or if without that, the mortgage is made to them jointly and not in shares, safely pay his money to Y and take a receipt and reconveyance from him; but Y will have

Joint account clause.

Conveyancing Act 1881, sec. 61.

Contributory mortgage.

[1] 44 & 45 Vict., c. 41, sec. 61.

[2] *Re Jackson* (1887), 34 Ch. D., 732; 56 L. J., Ch., 593; 56 L. T., 562.

to account for half of the money to the executors or administrators of X. A mortgage of this kind is styled a contributory mortgage[1].

Mortgage of equity of redemption.

There is nothing to prevent a mortgagor who has already mortgaged his property mortgaging it again; but, of course, the second mortgagee takes subject to the rights of the first mortgagee, and if there are several mortgagees they take in their order, subject to questions of priority that may arise, and which are dealt with hereafter, *e.g.*, tacking. Any second or subsequent mortgage, made after the day named in the first mortgage for repayment of the money, is strictly only a mortgage of the equity of redemption.

Mortgage of life interest with policy of insurance.

A life tenant sometimes desires to mortgage his life interest. In this case he insures his life, and mortgages his life interest and the policy of insurance. Such a mortgage contains special covenants with regard to the policy, viz., not to vitiate it, to effect a new policy if it should become void, to pay premiums, and to deliver receipts to the mortgagee. A power is also conferred on the mortgagee to pay the premiums on the default of the mortgagor, and the mortgagor covenants to repay such amounts with interest, and charges the same on the property mortgaged. A mortgage is also sometimes effected of a policy of insurance alone[2]. Notice of the assignment must be given to the insurance company to get a right of action on the policy[3].

Mortgage of railway stock.

A mortgage of railway stock or shares is effected by: (1) A transfer of the stock or shares to the

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[1] See Elphinstone's Introduction, 106-108, as to the different ways of framing a contributory mortgage.

[2] For precedents, 1 Prideaux, 622-630.

[3] Policies of Assurance Act 1867 (30 & 31 Vict., c. 144), secs. 3-6. See *Re Russell* (1872), L. R., 15 Eq., 30; *Newman* v. *Newman* (1885), 28 Ch. D., 674.

mortgagee, which is kept by the company[1], accompanied by a letter directing the company to pay dividends to the transferor until the transferee gives notice to the contrary; and (2) The usual form of mortgage deed reciting the transfer[2].

Mortgage of shares.

A mortgage of shares in a limited company can be carried out in the same way. But if the shares in the company do not require a deed to transfer them[3], a common plan is to lend upon a deposit of the share certificate and a transfer executed in blank accompanied by a signed memorandum declaring the true nature of the transaction; and under this the lender can at any time fill up the blank in the transfer and get himself registered as owner.

Anything may be mortgaged.

A mortgage may be effected of all sorts of interests and rights in land and other property. Thus, there may be a mortgage of a reversion, or remainder, of a legacy, or of a share in a residuary estate or under an intestacy, and a mortgage may itself form the subject of another security, viz., by way of sub-mortgage[4]. Thus, suppose A mortgages Whiteacre to B for £10,000. B has occasion for £3,000 temporarily, and does not wish to disturb A's mortgage; he can raise money on the security of the mortgage he holds from A. Suppose C agrees to lend him £3,000, the transaction would be carried out thus: After the usual covenants to pay the £3,000 and agreed interest, B assigns to C the principal debt of £10,000 owing by A, to hold to C, subject to redemption, and he also conveys Whiteacre to C, subject to the same right of redemption as he holds it subject

Sub-mortgage.

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[1] 8 & 9 Vict., c. 16, sec. 16.
[2] 1 Prideaux, 683.
[3] *Powell* v. *London and Provincial Bank* (1893), 2 Ch., 555; 62 L. J., Ch., 795; 69 L. T., 423.
[4] For precedent, 1 Prideaux, 636.

to. Then follows the proviso for redemption in B's favour, on payment of £3,000 and interest. Under this instrument, C has all the powers of B under the mortgage from A, and can, if necessary, enforce the original mortgage against A, and on receiving the money, pay himself, and pay the balance to B.

Covenants for title.

From our epitome of the contents of a mortgage deed of freeholds, it will be observed that the mortgagor conveys "as beneficial owner," and it is the same, ordinarily, in all mortgages (except a mortgage bill of sale) so that the usual covenants for title may be implied. These covenants for title have already been sufficiently considered in dealing with purchase deeds[1], where the distinction has been noticed, that whilst in a purchase deed the covenants are limited to extend only since the last sale of the estate, the covenants for title in a mortgage are absolute as against the acts of the whole world. It has also been pointed out how valueless covenants for title in a mortgage are[1]. It may be, however, that a trustee, or other person acting in a fiduciary capacity, is mortgaging, and in that event he will only be expressed to convey "as trustee," and the position as to implied covenants will then be the same as on a sale by a trustee[2]. If a lunatic's property is being mortgaged, the lunatic is made the party of the one part, and is expressed to be acting by his committee, and the mortgagee is made the party of the other part; and the lunatic (acting by his committee, who executes the deed for him) is expressed to convey as beneficial owner. Such a mortgage does not, as a rule, contain a covenant for payment, but it charges the property with half-yearly payments of interest, and it provides that so long

Mortgage of lunatic's property.

[1] Ante, pp. 372, 373, 374.
[2] Ante, p. 374.

as the lunatic lives and the interest is paid, the mortgagee cannot sell or foreclose or call in the principal[1].

Provision for compound interest.

The epitome we have given of a mortgage of freeholds contains the whole of the usual clauses and covenants, but sometimes others are inserted, whatever the property that is being mortgaged may be. Thus, it is not unusual, particularly in the case of a mortgage of a reversion, to insert a clause providing for the payment of compound interest, should the interest not be punctually paid, *i.e.*, to provide that each half-yearly payment of interest which is not paid within a stated time (usually 30 days) after it falls due shall be added to the principal and be payable therewith, and carry interest, and such a clause, though at one time considered bad, as in the nature of a penalty, is now held to be valid since the repeal of the usury laws in 1854[2]. Again, it is not at all unusual for there to be an arrangement for the mortgagor to pay an increased rate of interest should he not pay his interest, from time to time, within a certain period of its becoming due. In such a case the conveyancer should take care to reserve, firstly, the higher rate, and then reduce it to the normal rate on punctual payment, and this is a perfectly good provision; but if the ordinary rate is first reserved, and then there is a provision for increasing it, there are certain old decisions which lay it down that the clause is bad, as in the nature of a penalty. It may well be doubted whether such an absurd and technical distinction would be regarded at the present day, but there is no occasion to raise the point[3]. Sometimes

Clarkson v. *Henderson.*

Increasing rate of interest.

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[1] 2 K. & E., 141.

[2] *Clarkson* v. *Henderson* (1880), 14 Ch. D., 348; 49 L. J., Ch., 289; 43 L. T., 29.

[3] See hereon, Indermaur & Thwaites' Equity, 192, 193.

an arrangement is made that, if the interest is punctually paid, the mortgage money shall not be called in for a certain number of years. If this is so, the correct plan is, to frame the covenant to repay at the expiration of six months, and then insert a proviso that, for the agreed number of years, the mortgagee shall not be at liberty to call in the money if interest is punctually paid, and the mortgagor shall not be at liberty to pay off unless the mortgagee is willing. This proviso does not prevent the mortgagor redeeming at any earlier time, provided he pays interest for the whole period[1].

Proviso for mortgage to remain for a fixed period.

Various special clauses and covenants may, in particular cases, be advisable, but in framing them it must be borne in mind that no clause which really clogs or fetters the mortgagor's right or equity of redemption is valid. Thus, a proviso, that if the mortgage money is not repaid within five years, the mortgagor shall have no further right to redeem, is absolutely void[2]. And where a contingent remainder and a life policy are mortgaged together, a provision that if the contingent remainder fails to vest the life policy shall be the absolute property of the mortgagee, is void[3]. Also a clause by which the mortgagee is given the option of buying the equity of redemption is void[4], though such an option is valid if it is a genuinely separate transaction not contained in the mortgage deed[5]. The principle is expressed by the maxim, "Once a mortgage always a mortgage." But as regards debentures issued by a company under the Companies Acts, a condition is valid by which the debentures are made irredeemable

Clogging equity of redemption.

Perpetual debentures.

[1] *Teevan* v. *Smith* (1882), 20 Ch. D., 724; 51 L. J., Ch., 621.
[2] *Howard* v. *Harris* (1683), 2 Wh. & Tu., 11.
[3] *Salt* v. *Marquis of Northampton* (1892), A. C., 1; 61 L. J., Ch., 49; 65 L. T., 765.
[4] *Samuel* v. *Jarrah Timber Co.* (1904), A. C., 323; 73 L. J., Ch., 526; 90 L. T., 731.
Reeve v. *Lisle* (1902), A. C., 461; 71 L. J., Ch., 768; 87 L. T., 308.

or redeemable only on a contingency, or at a time, however remote[1].

Collateral advantage.

But a clause in a mortgage whereby it is provided that the mortgagee shall gain some collateral advantage beyond the repayment of his mortgage money, with interest, is valid, if not unconscionable or oppressive. Thus in *Biggs* v. *Hoddinott*[2] a publican mortgaged his leasehold public-house to a brewer, and it was provided that the loan should continue for a period of five years, and the mortgagor covenanted that he would not, during that period, sell on the premises beer other than that supplied by the mortgagee; and it was held that the covenant was valid, and could be enforced by injunction. But any attempt in the mortgage deed to impose any fetter on the mortgage property, which is to continue after the mortgage has been paid off, is void. Thus in *Noakes* v. *Rice*[3] a publican mortgaged his leasehold public-house to a brewer, and covenanted that he would not, during the continuance of the term of the lease under which he held, and whether any principal money or interest should, or should not, be owing upon the security, sell on the premises any malt liquors, except such as should be purchased from the mortgagee; and it was held that this covenant was not binding on the mortgagor after he had repaid the mortgage money and interest. And, equally, any provision in the mortgage deed is void if it imposes a personal obligation on the mortgagor which is to continue after the mortgage is paid off. Thus in *Bradley* v. *Carritt*[4] a mortgage of shares in a tea company contained a covenant by the mortgagor

Biggs v. *Hoddinott.*

Noakes v. *Rice.*

Bradley v. *Carritt.*

[1] 8 Edw. VII., c. 69, sec. 103. This provision is retrospective.

[2] (1898), 2 Ch., 307; 67 L. J., Ch., 540; 79 L. T., 201; 47 W. R., 84. See also *Mainland* v. *Upjohn* (1889), 41 Ch. D., 126; 58 L. J., Ch., 361; 60 L. T., 314.

[3] (1902), A. C., 24; 71 L. J., Ch., 139; 86 L. T., 62.

[4] (1903), A. C., 253; 72 L. J., K. B., 471; 88 L. T., 633.

to get the mortgagee always employed by the company as its broker, and failing that to personally pay the mortgagee what he would have otherwise earned from the company; and this provision was held to become void as soon as the mortgage was paid off. The effect of the three House of Lords' decisions just set out may be summed up by saying that a fair collateral advantage may be stipulated for, up to the time for redemption; but that any covenant which purports to bind either the property or the mortgagor after the time of complete redemption, is bad, as being a clog on the right to redeem and have the property back again in its original state[1]. Summary.

A binding agreement to lend money on mortgage is not, usually, entered into, and, therefore, generally a mortgagee is entitled to the full title that the law allows to a purchaser under an open contract[2]; and, in the case of leasehold property, a mortgagee may, sometimes, reasonably enquire into the title to the reversion, if the lease has only very recently been granted. This, however, must depend on the circumstances, but if a solicitor, acting for a mortgagee, accepts a less title than the law allows, he may be liable for negligence should there be any defect in the title which he would have discovered had he demanded the full title, unless, indeed, he has acted under the express instructions of his client, the mortgagee. Still, his liability must mainly turn on whether he has acted with reasonable prudence in accepting a shorter title. As regards trustees advancing money on mortgage, it is expressly provided that a trustee shall not be chargeable with breach of trust only on the ground that, in lending money upon the security of any property, he has accepted a shorter Title a mortgagee may require. Trustee Act 1893, sec. 8 (3).

[1] *Santley* v. *Wilde* (1899), 2 Ch., 474; 68 L. J., Ch., 681; 81 L. T., 393, must be taken to be overruled by the cases quoted in the text.

[2] Ante, pp. 270-273.

title than he was entitled to require, if, in the opinion of the Court, the title accepted is such as a person acting with prudence and caution would have accepted[1]. An abstract of title is delivered by the mortgagor's solicitor, and the title is investigated exactly in the same way as on a purchase[2], and the completion takes place at the office of the mortgagee's solicitor.

Costs.

The mortgagor pays the whole costs of the mortgage, that is, the costs not only of his own solicitor, but of the mortgagee's solicitor. If a solicitor is personally advancing the money and acting for himself, he is now, under the Mortgagees Legal Costs Act 1895[3], entitled to charge his ordinary costs for acting in, negotiating, and completing the mortgage, and, further, may also charge for all work done, as a solicitor, in connection with the matter subsequently. Formerly it was otherwise[4]. All necessary acts to complete the mortgage deed must be done exactly as in the case of a purchase deed[5].

The rule in *Dearle* v. *Hall*.

If the mortgage is of a chose in action, *e.g.*, a debt, life policy, or reversionary interest in personal property outstanding in the hands of trustees—the rule in *Dearle* v. *Hall*[6] must be observed, and notice of the mortgage given to the debtor, insurance company, or trustees. If no notice is given, the mortgagee is guilty of laches, for he places it in the power of the mortgagor to deceive other persons who do not know, and have no means of knowing, of the previous dealing with the outstanding property, and, therefore, such a mortgagee will lose his priority, as

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[1] 56 & 57 Vict., c. 53, sec. 8 (3). This provision applies equally to purchases.

[2] Ante, Chap. XI.

[3] 58 & 59 Vict., c. 25.

[4] Indermaur & Thwaites' Equity, 258, and cases there quoted.

[5] Ante, pp. 389-391.

[6] (1823), 3 Russ., 1; see Indermaur & Thwaites' Equity, 16, 17; 2 Wh. & Tu., 40.

against a subsequent mortgagee who takes *bonâ fide* without notice of him and does give notice before him to the holder of the chose in action. But this rule as to notice only applies to assignments of choses in action; and does not apply to land, so that if a mortgagee of land creates an equitable sub-mortgage on his interest, and the chargee omits to give notice to the mortgagor, he does not, by this omission alone, lose his security as against a subsequent equitable sub-mortgagee who is the first to give notice to the original mortgagor[1]. Still, in every case, with a view to his own practical protection, a mortgagee should give notice to the person from whom money, in which he has an interest, is coming; thus, in such a case as just mentioned, if the equitable sub-mortgagee did not give notice to the mortgagor of the interest he has acquired, he might lose his money, by the mortgagor, in ignorance of his interest, paying the money to the original mortgagee. Where it is necessary to give notice, such notice should be given to the party who is sought to be affected thereby, for it does not necessarily follow that notice to the solicitor of a party is equivalent to notice to him, as there is no such thing as a permanent office of solicitor[2]. If, therefore, notice is not given direct to the person it is desired to charge with notice, but to his solicitor, the party giving it should always require the solicitor to get an acknowledgment of the receipt of it from his client[2]. Where property mortgaged is in the hands of several trustees, it is advisable to give notice to all of them, but it is not strictly necessary for the purpose of retaining priority[3]. Notice once properly given to all the parties to whom it should

Hopkins v. *Hemsworth.*

Saffron Walden Building Society v. *Rayner.*

Re Wasdale.

[1] *Hopkins* v. *Hemsworth* (1898), 2 Ch., 347; 67 L. J., Ch., 526; 78 L. T., 832; 47 W. R., 26.

[2] *Saffron Walden Building Society* v. *Rayner* (1880), 14 Ch. D., 406; 49 L. J., Ch., 465.

[3] *Willes* v. *Greenhill* (1862), 31 L. J., Ch., 1.

be given is effectual; so that where notice of an assignment of an equitable interest is given to all the existing trustees, and they retire or die, and new trustees are appointed, to whom the notice is not passed on, and who know nothing of the first assignment, such assignee is not postponed to a subsequent assignee for value without notice who gives notice to the new trustees[1].

Distringas notice.

If the property mortgaged consists of stocks or shares, it is very usual, for the purpose of additional security, for the mortgagee to put a distringas notice on such stocks or shares, under which he will be entitled to notice should the person in whose name the stocks or shares stand attempt to deal with them[2]. Still this is not a necessary, though it is often a prudent, step. If, however, the property mortgaged consists of stock, or money, in Court, then, to complete the mortgage, it is absolutely necessary to obtain a stop order[3]; and giving notice to the trustees is of no avail as regards a subsequent assignee who takes *bonâ fide* for value, without notice, and obtains a stop order—even although he does not obtain such stop order until after he had notice[4].

Stop order.

Inquiries of trustees.

In connection with the point of notice, it should be observed that no person should advance money on mortgage, where notice will be necessary to complete the security, without first making inquiry of the trustees or other legal holders of the property, whether they have received notice of any prior dispositions made by the proposed mortgagor. Trustees

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[1] *Re Wasdale, Brittin* v. *Partridge* (1899), 1 Ch., 163; 68 L. J., Ch., 117; 79 L. T., 520; 47 W. R., 169.
[2] Indermaur's Practice, 333, 334.
[3] Ibid., 286.
[4] *Re Holmes* (1886), 29 Ch. D., 786; 55 L. J., Ch., 33.

are not bound to answer such an inquiry[1]; and if they do answer it, and give what they believe to be a true answer, they are not liable should it turn out that the answer is incorrect[2], unless their answer is of such a kind as to produce estoppel[3]. Thus A, being about to advance money to B, on the security of money in the hands of trustees, inquires of them if they have notice of any prior charge by B, and they reply that they have notice of charges in favour of X and Y. They, in fact, have received notice of another charge in favour of Z, but have forgotten it, and by reason of not knowing of this charge A advances to B and loses his money. Here the trustees are not liable. If, however, they make a distinct statement that they have not received notice of any other charges than those to X and Y, then they will be liable, because they will be estopped from denying their own definite statement. In addition to the inquiry mentioned above, a proposed mortgagee of property held by trustees should inquire of them as to the amount or extent of the property, and whether it is free from other claims, *e.g.*, debts of a testator, and also how it is invested; and the trustees must, at the request of the intending mortgagor, answer such an inquiry.

Low v. *Bouverie*.

Burrowes v. *Lock*.

So far we have been dealing with legal mortgages, but there is another kind of mortgage that must be noticed, and that is an equitable mortgage, which may be defined as a charge on property created by any memorandum in writing without conveyance, or by a mere deposit of the muniments of title, either with or without any memorandum in writing[4]. Such a memorandum or deposit creates a binding

Equitable mortgages.

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[1] *Low* v. *Bouverie* (1891), 3 Ch., 82; 66 L. J., Ch., 594; 65 L. T., 533. [2] Ibid.

[3] *Burrowes* v. *Lock* (1805), 1 Wh. & Tu., 446.

[4] *Russell* v. *Russell* (1783), 2 Wh. & Tu., 76.

Indermaur & Thwaites' Equity, 194.

charge on property, on sound principles of Equity[1]; but at the same time an equitable mortgage does not commend itself to the prudent investor, for the mortgagee does not get the legal estate, has not got the powers of a mortgagee by deed, and is liable to be postponed in favour of a subsequent legal mortgagee who takes *bonâ fide* for value and without notice[2]. It is usually only adopted for the purpose of obtaining a temporary advance, and often in anticipation of a legal mortgage. We shall have occasion, hereafter, in several respects, to compare an equitable with a legal mortgage.

Disadvantages of a second mortgage.

It has been pointed out that there is nothing to prevent a person mortgaging his property a second time, or, indeed, any number of times, but a second or subsequent mortgagee is not in as advantageous a position as a first mortgagee, and the disadvantages he labours under may here be conveniently summarized: (1) He does not get the legal estate, or the deeds, both of which are taken by the first mortgagee. (2) He is liable to be postponed, in some cases, by reason of the doctrine of tacking. (3) He is entirely subject to the first mortgage, and can only exercise his powers subject to the first mortgagee's rights. (4) He is liable to be made a party to a foreclosure suit, or to have the property sold over his head, and it may be necessary for him, to prevent his losing the entire security by the enforcement by the first mortgagee of his rights, to pay him off, and thus take the security into his own hands. Some of these points will present themselves forcibly to the reader as he proceeds.

Effect and consequences of a mortgage.

The immediate technical effect of a legal mortgage of freehold or leasehold property, or of copyholds

[1] Indermaur & Thwaites' Equity, 194.
[2] Ibid., 211.

when the mortgagee has been admitted, is that the mortgagor has divested himself of his legal ownership, and that the legal estate is in the mortgagee. The property is conveyed to the mortgagee, and though the mortgagor is allowed to remain in possession, he is really only tenant at will, or perhaps, more accurately, at sufferance, to the mortgagee. At the same time the mortgagee has no absolute estate at first, even at law, for the mortgagor has a conditional estate under the proviso for redemption, and though when the day named for redemption has gone by, the mortgagee has an absolute estate at law, he has in equity nothing of the kind. Certain legal consequences ensue from these positions, which, however, have been much modified by statute. Firstly, an owner having mortgaged his estate must at Common Law be quite unable thenceforth to bring any action to recover rent from a tenant, or to sue for damages in respect of any trespass or other wrong; secondly, he could not by himself make a valid lease, for the lessee would be liable to be ejected by the mortgagee[1], and neither could the mortgagee make a lease which would be binding on the mortgagor after he had paid off the mortgage. A power to grant leases was sometimes specially conferred or reserved by the mortgage deed, but in the absence of this, the only safe course was for both mortgagee and mortgagor to join in granting the lease, the rent being reserved to the mortgagee until redemption, and then to the mortgagor, or, if it were reserved generally, it would enure in this way. Both of these matters have been, however, dealt with by statute.

Keech v. *Hall*

With regard to the first point, the Judicature Act 1873 enacts[2] that a mortgagor—entitled for the time

Mortgagor suing to recover rent, and for trespass.

[1] *Keech* v. *Hall* (1778), 1 Smith's Leading Cases, 494. But in such case the lessee can redeem the mortgage and so make himself secure (*Tarn* v. *Turner* (1888), 39 Ch. D., 456; 57 L. J., Ch., 1085).

[2] 36 & 37 Vict., c. 66, sec. 25 (5).

being to the possession, or the rents and profits of any land, as to which his mortgagee has not given notice of his intention to take possession—may sue to recover the possession, or the rents and profits, or to prevent, or recover damages for, any trespass or other tort[1] in relation thereto, in his own name only, unless the cause of action arises on a lease, or other contract, made by him jointly with any other person. But this does not enable a mortgagor in possession to sue the lessee for breach of covenants (except rent) in the lease[1], or to exercise the right of re-entry conferred by the proviso for re-entry in a lease made by himself before the mortgage was created[2].

Leases of mortgaged property.

With regard to the second point, the Conveyancing Act 1881 enacts[3] that a mortgagor of land while in possession shall, as against every incumbrancer, and a mortgagee of land while in possession shall, as against all prior incumbrancers (if any) and as against the mortgagor, have power to make leases as follows: An agricultural or occupation[4] lease for not exceeding 21 years, and a building lease for not exceeding 99 years. The lease is to take effect within 12 months from date; to be at the best rent that can be obtained without fine; to contain a covenant for payment of rent, and a condition of re-entry on non-payment for not exceeding 30 days. A counterpart is to be executed by the lessee and delivered to the lessor, but execution of the lease by the lessor is, in favour of the lessee, sufficient evidence of this. A building lease must be in consideration of houses, or buildings, having been erected or improved, or to be erected or

[1] *Turner* v. *Walsh* (1909), ante, p. 448.

[2] *Matthews* v. *Usher* (1901), 2 Q. B., 535; 69 L. J., Q. B., 856; 81 L. T., 542.

[3] 44 & 45 Vict., c. 41, sec. 18.

[4] This does not authorize a lease of sporting rights simply; but an occupation lease may include rights of sporting over other land previously granted with the land demised (*Brown* v. *Peto* (1900), 2 Q. B., 653; 69 L. J., Q. B., 869; 83 L. T., 303). The lease may give the lessee an option to determine, but must not include unmortgaged property at one entire rent (*King* v. *Bird* (1909), 1 K. B., 837; 78 L. J., K. B., 499).

improved within five years, and a nominal rent may be reserved for the first five years. If the lease is made by the mortgagor, he must, within one month of making the lease, deliver to the mortgagee (or if more than one, then to the mortgagee first in priority) a counterpart of the lease duly executed by the lessee; but the lessee is not to be concerned to see that this provision is complied with[1]. The foregoing statutory power of leasing only applies to mortgages made by deed since 1881, and can be excluded or extended or varied in any way by the express provisions of the mortgage deed.

Points hereon.

It will be observed that the Act very properly confers no power of granting a mining lease, that it is the person who is in possession to whom the power of leasing is given, and that the power may be excluded by express agreement. It has become a very common practice to insert in a mortgage a clause excluding the mortgagor's statutory power of leasing, but it by no means follows that this should be done as a matter of course. In the case of a mortgage of a large estate, it does not seem reasonable to exclude it and thus compel the landowner who has effected a mortgage to ask his mortgagee for his consent whenever he wishes to make a lease; but in the case of a mortgage of a house, it is reasonable that the mortgagee should be consulted, and, therefore, the provision may appropriately be excluded, though even here it may be well to add an exception enabling the mortgagor to create tenancies from year to year, or for any less period, without getting the mortgagee's consent.

Summary as to leases by mortgagor.

If a mortgagor grants a lease before the mortgage, it is binding on everybody. And until the mortgagee

[1] But the mortgagor's default causes the statutory power of sale to arise immediately under 44 & 45 Vict., c. 41, sec. 20 (iii).

gives the tenant notice to pay rent to him, the tenant can safely pay it to the mortgagor[1], and the mortgagor can distrain for it as bailiff of the mortgagee[2], and can sue for it in his own name[3]. But the mortgagor cannot accept a surrender of such a lease[4] or (if the lease was made before 1882) enforce the proviso for re-entry[5]. A lease granted by the mortgagor after the mortgage (and not made under an express or statutory power) does not bind the mortgagee, but operates by estoppel between the mortgagor and the tenant; and under it the mortgagor can distrain and sue for rent, and sue on the covenants and enforce the proviso for re-entry, and accept a surrender[4]—until the mortgagee asserts his title. If a mortgagor grants a lease after the mortgage which is binding on the mortgagee under section 18 of the Conveyancing Act 1881, no valid surrender can be made except to the mortgagee[4], but, until the mortgagee gives the tenant notice to pay rent to him, the mortgagor is the person entitled to the income, and, therefore, can recover, receive, enforce, and take advantage of the rent, and the benefit of every covenant or provision to be observed or performed by the lessee, and every condition of re-entry and other condition in the lease[6]. A payment of rent to the mortgagor is good, if the rent was actually due and was paid before the mortgagee gives the tenant notice to pay to him[7]; but a voluntary payment of rent to the mortgagor in advance is only a loan by the tenant[8], and is void against the

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[1] 4 & 5 Anne, c. 3, secs. 9, 10.
[2] *Trent* v. *Hunt* (1853), 9 Ex., 14.
[3] 36 & 37 Vict., c. 66, sec. 25 (5).
[4] *Robbins* v. *Whyte* (1906), 1 K. B., 125; 75 L. J., K. B., 38.
[5] *Matthews* v. *Usher* (1900), 2 Q. B., 535; 69 L. J., Q. B., 856.
[6] 44 & 45 Vict., c. 41, sec. 10; *Turner* v. *Walsh* (1909), 2 K. B., 484; 78 L. J., K. B., 753.
[7] *Cook* v. *Guerra* (1872), L. R., 7 C. P., 132; 41 L. J., C. P., 89.
[8] *De Nicolls* v. *Saunders* (1870), L. R., 5 C. P., 589; 39 L. J., C. P., 297.

mortgagee on his giving notice to the tenant to pay it to him when it falls due.

Agricultural Holdings Act 1908.

With regard to agricultural tenancies, the Agricultural Holdings Act 1908[1] contains certain provisions to protect a tenant who holds under a tenancy from a mortgagor which is not binding on the mortgagee. It provides that the occupier shall, as against the mortgagee who takes possession, be entitled to any compensation which is, or, but for the mortgagee taking possession, would be due to the occupier from the mortgagor, for crops, improvements, tillage, and other matters connected with the holding; and that, before the mortgagee deprives the occupier of possession, except as provided by the lease, he shall give him six months' notice in writing, and if he so deprives him, compensation shall be made to the occupier for any unexhausted improvement.

Rights of mortgagor in possession.

As a mortgagor has only conditionally parted with his estate, it seems reasonable, subject to what has been stated as regards the granting of leases, that he should be permitted, until the mortgagee takes possession, to continue generally to deal with the property in the way he has hitherto been in the habit of dealing with it, and to enjoy it in the same way as theretofore, provided the mortgagee is not thereby prejudiced. Therefore, though a mortgagor is not justified in committing extreme acts of waste, he may continue to get coal, gravel, etc., and cut timber, provided only that, in doing so, he does not imperil the position of the mortgagee. But if the mortgagee can shew that he has a scanty security which is being imperilled by the mortgagor's acts, then he is entitled to obtain an injunction to restrain

[1] 8 Edw. VII., c. 28, sec. 12, replacing 53 & 54 Vict., c. 57, sec. 2.

the mortgagor from so acting[1]. This seems reasonable, and it must be borne in mind that if a legal mortgagee does not approve of the mortgagor's conduct, he can bring an action to eject him.

Payment off of mortgage.

The relationship of mortgagor and mortgagee may go on smoothly for many years, and the mortgagor may voluntarily repay the money. A mortgagor is entitled to repay the money, with interest to date, if he observes the day named for repayment in the mortgage deed[2]. But if he does not observe that day, then he must give the mortgagee six months' notice of his intention to repay him, or pay six months' interest in lieu of notice, for it is only reasonable that the mortgagee should have an opportunity given him of finding a fresh security for his money[3]. And if, having given such a notice, the mortgagor does not then strictly observe the day for payment, the mortgagee is entitled to a fresh six months' notice, or six months' interest, in lieu of notice[4]. But the mortgagor may pay off without notice or interest in lieu of notice, if the mortgagee demands payment or takes proceedings to realize his security[5] or goes into possession[6]. And the rule as to six months' notice or interest does not apply to an equitable mortgage by deposit, where the only notice required is a reasonable time to look up the deeds[7]. Not only is a mortgagor entitled to pay off a mortgage, but any person interested in the property may do so, *e.g.*, a tenant by the curtesy, a tenant in dower, and a judgment creditor; and it has even

Fitzgerald's Trustee v. *Mellersh.*

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[1] Hood & Challis' Conveyancing and Settled Land Acts, 89.
[2] *Chesworth* v. *Hunt* (1880), 5 C. P. D., 271.
[3] *Johnson* v. *Evans* (1890), 61 L. T., 18.
[4] *Bartlett* v. *Franklin* (1877), 15 W. R., 1077; 36 L. J., Ch., 671.
[5] *Letts* v. *Hutchins* (1872), L. R., 13 Eq., 176; *Smith* v. *Smith* (1891), 3 Ch., 550; 60 L. J., Ch., 694; 65 L. T., 334.
[6] *Bovill* v. *Endle* (1896), 1 Ch., 648; 65 L. J., Ch., 298.
[7] *Fitzgerald's Trustee* v. *Mellersh* (1892), 1 Ch., 385; 61 L. J., Ch., 231; 66 L. T., 178.

been held that a tenant for years, holding under an agreement for a lease made subsequently to the mortgage of the property, and by which the mortgagee is not bound, is entitled to redeem[1]. *Tarn* v. *Turner.*

When the mortgage is paid off, the property is duly reconveyed to the mortgagor or other person interested in the property, who makes the payment off. If the mortgagee has become a lunatic, the committee applies to the lunacy judge for an order vesting the land in the mortgagor, or appointing him to convey to the mortgagor[2]. If the mortgagee be dead, unless the property is copyhold, it is always the personal representatives of the mortgagee who reconvey[3]. If the property is copyhold, and the mortgagee has been admitted, then, although the mortgage money is paid to the personal representatives of the mortgagee, it is the customary heir or the devisee[4] of the mortgagee, as the case may be, who reconveys[5]. If the mortgagee has not been admitted, no formal reconveyance is necessary, but it is sufficient to take a receipt for the money from the personal representatives of the mortgagee, and enter up satisfaction on the court rolls. It is customary, in practice, to indorse the reconveyance of mortgaged property on the mortgage deed, and this is the best plan, as the instrument which created the charge carries with it, on any inspection, the evidence of its cessation. The mortgagor, or other person paying off a mortgage, bears the whole costs of such payment off and of the reconveyance. Reconveyance. Costs.

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[1] *Tarn* v. *Turner* (1888), 39 Ch. D., 456; 57 L. J., Ch., 1085; 59 L. T., 742.
[2] 53 & 54 Vict., c. 5, sec. 135; 8 Edw. VII., c. 47, sec. 1.
[3] 44 & 45 Vict., c., 41, sec. 30.
[4] *Lord Braybrooke* v. *Inskip* (1803), Tudor's Conveyancing Cases, 322.
[5] 57 & 58 Vict., c. 46 (Copyhold Act 1894), sec. 88.

Building Society mortgage.

When a mortgage to a building society is paid off, statute law provides that the society may indorse upon or annex to the mortgage either a reconveyance or a receipt (in statutory form) for all moneys intended to be thereby secured under the seal of the society and countersigned by its secretary or manager, and such receipt is sufficient to vest the property in the person for the time being entitled[1] to the equity of redemption without any reconveyance[2].

Assigning mortgage debt.

Where a mortgage is paid off, the property is, usually, simply reconveyed, and the mortgage debt extinguished; but the Conveyancing Act 1881[3] empowers a person entitled to redeem to require the mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to any third person as he may direct, unless the mortgagee has taken possession. If a legal mortgage is paid off without any reconveyance or transfer being made, the legal estate remains in the mortgagee, though without any interest therein in him, and after the lapse of 13 years such legal estate is absolutely extinguished by virtue of the Real Property Limitation Act 1874[4].

Payment off without reconveyance.

Transfer of mortgage.

It very frequently happens that a mortgagee requires his money, and the mortgagor is not able to himself find the amount, and it is arranged that some new lender shall advance the money and take over the security. Such an arrangement, as regards freehold, or leasehold property, may be carried out in two ways: (1) By the original mortgagee

[1] This means the person who has the best right to call for the legal estate, and not necessarily the person who pays the money (*Hosking* v. *Smith* (1889), 13 A. C., 582; 58 L. J., Ch., 369; 59 L. T., 565).

[2] 37 & 38 Vict., c. 42, sec. 42.

[3] 44 & 45 Vict., c. 41, sec. 15.

[4] *Re Sands to Thompson* (1883), 2 Ch. D., 614; 52 L. J., Ch., 466; ante pp. 216, 217, 311.

reconveying, re-assigning, or surrendering, as the case may be, to the mortgagor, and the mortgagor simultaneously executing a fresh mortgage to the new lender; (2) By the existing mortgage being made over to the new lender by means of a transfer. If the second plan is adopted, the transfer contains (*a*) an assignment of the mortgage debt, and (*b*) a conveyance of the mortgaged property subject to the existing equity of redemption[1]. A mortgage may be transferred by the mortgagee alone, without the mortgagor joining, for he can assign the debt and convey the estate; or it may be made with the concurrence of the mortgagor, he being made a party to the deed, and this is always the preferable plan.

Contents of transfer.

If a mortgagee transfers to the new lender, without the mortgagor joining, the transferee takes only such interest as the mortgagee had vested in him, and is subject, therefore, to all rights and equities that may be existing between the original mortgagor and mortgagee[2]. Thus, A mortgages to B for £1000, and then pays off £500. B fraudulently represents to C that the whole mortgage money remains owing, and transfers to C in consideration of £1000. Here C has only got a good security for £500 as against A, for he cannot have greater rights than B had. But if C first inquires of A as to whether the mortgage is still subsisting for the full amount, such a difficulty as this could not arise, and, therefore, if this is done and a satisfactory answer received, no real advantage is gained by making the mortgagor a party. It is, however, usual and proper to make the mortgagor a party if the transfer is being effected for his convenience, as is generally the case, for the ordinary occasion for a transfer is that the mortgagee has called in his money and the mortgagor requests

As to mortgagor joining.

[1] For precedents, 1 Prideaux, 720-742.

[2] *Turner* v. *Smith* (1901), 1 Ch., 213; 70 L. J., Ch., 144; 83 L. T., 702.

another person to advance. This, however, is not always the case, for a mortgage may be for a fixed period of years, and before its expiration the mortgagee may want his money. Any transfer of the mortgage would here be for the mortgagee's convenience, and at his request, and the mortgagor could not be compelled to join in it, so that the transferee would, necessarily, have to be content with making inquiry of him. The whole costs of a transfer of a mortgage are borne by the mortgagor when the transfer is for his convenience, and by the mortgagee when the transfer is at his instance and for his convenience. When a mortgage is transferred, there is nothing to prevent the new lender making a further advance to the mortgagor, and taking security for this by the same deed. It does not matter, in practice, whether the arrangement for making over an existing mortgage to another person is carried out by either the first or the second of the methods mentioned at the commencement of this paragraph, unless there is some subsequent mortgage existing; but, in that event, it will be important to carry it out in the second mentioned way, so as to keep the original mortgage alive and preserve its priority.

Costs.

Transfer of mortgage of copyhold property.

As regards a mortgage of copyholds, where the mortgagee has been admitted, he, of course, is in a position to transfer in a direct manner by surrender to, and admittance of, the transferee. Where, however, as is usually the case, he has not been admitted, if the mortgagor has not incumbered his equity of redemption and will join in the transaction, the proper plan is to enter up satisfaction of the existing conditional surrender and take a new conditional surrender to the transferee. If, however, the mortgagor will not or cannot join, or if the mortgagor has incumbered his equity of redemption, the proper course is for the mortgagee to be admitted, and then

he can surrender to the transferee. This means some additional expense; but the only other course open is for the original mortgagee who is transferring to declare himself a trustee for the transferee of the benefit of the original surrender, and very likely the transferee may not be content with this[1]. The mortgage debt is transferred by deed[2]. The position as to costs of the transaction depends on the same points as mentioned in the last paragraph with regard to transfers in the case of mortgages of freehold and leasehold property.

Statutory transfers and reconveyances.

Where a security on land has been effected by statutory mortgage[3] a transfer is effected by statutory transfer[4], which is very brief, and vests in the transferee all the rights that would be vested in him by a transfer in the usual and more detailed form. Such a transfer must be expressed to be made "by way of statutory transfer." So, also, property mortgaged by statutory mortgage may be reconveyed by a very short form, which must be expressed to be made "by way of statutory reconveyance[5]."

Mortgagee must take care of deeds.

A mortgagee is bound to take due care of the title deeds of the mortgaged property, including the mortgage deed, and all the deeds must be handed over to the person redeeming. If any deed has been lost, the mortgagor, or such other person, is entitled to have a proper indemnity in respect of the lost deed, at the cost of the mortgagee[6].

Having now considered the creation of mortgages, the transfer of such securities, and the reconveyance

[1] 1 Prideaux, 730.
[2] Precedents, 1 Prideaux, 730, *et seq.*
[3] Ante, p. 455.
[4] 44 & 45 Vict., c. 41, sec. 27.
[5] Ibid., sec. 29.
[6] *James* v. *Rumsey* (1879), 11 Ch. D., 398; 48 L. J., Ch., 345.

of the property, we will next proceed to look at the position of the mortgagee where everything does not thus run smoothly, and where he has to take steps to enforce, or to protect his security. Here we shall find that he has certain natural rights irrespective of statute, and certain rights conferred by statute. His natural rights are: (1) to take possession, (2) to sue on the covenant for payment, (3) to sue for foreclosure, and (4) under certain conditions a right to tack and (by express contract) a right of consolidation. His statutory rights are to sell, to insure, to appoint a receiver, and when in possession to cut ripe timber and make leases. As to these statutory rights, it was formerly necessary to insert express clauses in the mortgage deed, giving him such rights; but these clauses may now be omitted, and, in practice, are always omitted, though occasionally variations or additions are made, *e.g.*, by declaring that a mortgagee's right to sell shall arise at an earlier time, or on different events, than would be the case under the statutory power.

Mortgagee's natural rights

and statutory rights.

Mortgagee's natural rights

Entry.

Dealing firstly with a mortgagee's natural rights and powers, we observe that he has a power to enter on the mortgaged premises, and if he cannot peaceably obtain possession he may bring an action of ejectment against the mortgagor. If the mortgagor is not actually occupying the property, but it is in the possession of tenants, the mortgagee may give them notice to pay the rents to him, and this is equivalent to himself taking possession, and, after such notice, the tenants must pay their rents, not to the mortgagor, but to the mortgagee, and this whether the tenancy was created prior to or since the mortgage[1]. If the mortgagor is himself occupying the premises, some time may elapse before the

[1] *Moss* v. *Gallimore* (1780), 1 Smith's Leading Cases, 514.

mortgagee can obtain possession; and, formerly, in such a case, it was the practice to insert in the mortgage deed an attornment clause, whereby the mortgagor acknowledged himself tenant to the mortgagee, at a rent equivalent to the interest on the mortgage money; and the advantage of this was, that the relationship of landlord and tenant being thus created, the mortgagee could distrain for his interest as if it were actual rent due from a tenant. But section 6 of the Bills of Sale Act 1878 says that such an attornment clause shall be deemed a bill of sale within the meaning of that Act so far as regards the power of distress; consequently if the mortgage does not comply with the requirements of that Act[1] (which in practice it never does), it gives no power of distress for interest[2]. But a practical advantage may still be gained by it, for it does create the technical relationship of landlord and tenant between the mortgagor and mortgagee, and if it authorizes the mortgagee to determine the tenancy at any time without notice[3], the mortgagee may issue a specially indorsed writ under Order III., rule 6, to recover possession, and if the mortgagor enters an appearance may get speedy judgment under Order XIV.[4]. So there can be no harm in inserting an attornment clause, though whether it is or is not inserted is not a matter of much importance[5]. If inserted, it should expressly state that the specified rent is not

Attornment.

Kemp v. *Lester*.

[1] See post, p. 507.

[2] *Re Willis, Ex parte Kennedy* (1888), 21 Q. B. D., 384; 57 L. J., Q. B., 634; 59 L. T., 749. It has been held that the attornment clause is not required to be in the statutory form of a bill of sale to secure the payment of money under the Bills of Sale Act 1882 (*Green* v. *Marsh* (1892), 2 Q. B., 330; 61 L. J., Q. B., 442; 66 L. T., 480). As to mortgages by bills of sale see post, p. 498.

[3] This makes it a tenancy at will (*Kemp* v. *Lester*, infra), and it terminates on the death or alienation of the mortgagor (*Turner* v. *Barnes* (1862), 2 B. & S., 435; *Pinhorn* v. *Souster* (1853), 8 Ex., 763).

[4] *Mumford* v. *Collier* (1890), 25 Q. B. D., 279; 59 L. J., Q. B., 552; 38 W. R., 716; *Kemp* v. *Lester* (1896), 2 Q. B., 162; 65 L. J., Q. B., 532; 74 L. T., 268; Indermaur's Practice, 57.

[5] For precedent, 1 Prideaux, 591; 2 K. & E., 67.

to be recoverable by distress, and that the tenancy is not to make the mortgagee liable to account to anyone as a mortgagee in possession.

Position of mortgagee in possession.

A mortgagee who goes into possession, having taken that responsibility upon himself, cannot safely afterwards go out of possession without the mortgagor's consent; for he remains liable in respect of the property, and if he transfers his mortgage without similar consent, after he has gone into possession, he is liable for the acts of the transferee[1]. He must keep a strict account of the rents and profits, and is liable not only for what he has received, but also for what he ought to have received. He applies the rents and profits in paying expenses, and keeping down his interest, and if there is any surplus he must pay for any necessary repairs to the property though, except to this extent, he is not under any obligation to keep the property in repair. If the net rents are more than sufficient for the interest, the mortgagee need not pay them over to the mortgagor, but may retain, and invest, and accumulate them towards payment of principal, receiving interest in the meantime on his full mortgage money; unless he entered when no interest was in arrear, and there was no other good reason for his entering (*e.g.*, to prevent a forfeiture), in which case he must apply them year by year in reduction of his principal, and is only entitled to receive interest on the amount of his mortgage as thus reduced from time to time, and which is styled taking his accounts with annual rests[2]. A mortgagee in possession is allowed at law, quite irrespective of the statutory power hereafter mentioned[3], to cut timber, and commit any other

Annual rests.

[1] *Re Prytherch, Prytherch* v. *Williams* (1890), 42 Ch. D., 500; 59 L. J., Ch., 79; 61 L. T., 799.

[2] Indermaur & Thwaites' Equity, 205, 206.

[3] Post, p. 487.

acts of waste his mortgagor might lawfully have committed, provided he has an insufficient security, but not unless[1]. A mortgagee, whether in possession or not, may add to his security all money he properly expends on the property for the protection of his security, *e.g.*, if he is in possession, in doing necessary repairs; but he has no such right merely in respect of money expended in improvements, as he may not make the estate more expensive to redeem than is necessary[2].

What mortgagee may add to mortgage debt.

When the mortgage money is due, the mortgagee may, of course, sue to recover it, and the time within which he must sue has already been explained[3]. If, however, a mortgagee sues, and recovers judgment, that causes a merger of the obligation under the covenant to pay, and, therefore, from the time of the judgment, only 4 per cent. per annum interest can be recovered on the judgment debt itself, whatever may be the rate of interest reserved by the mortgage deed[4]. But the mortgagee will still be entitled as against the mortgaged property to enforce the covenanted rate of interest[5].

Mortgagee suing.

Ex parte Fewings.

A mortgagee has another natural right in equity, and that is to foreclose. Foreclosure consists of proceedings taken by the mortgagee against the mortgagor and any subsequent mortgagees for the purpose of shutting them out from any further right or equity of redemption. This is a matter appertaining to a study of the principles, and practice, of Chancery[6], but it may be remarked that foreclosure

Foreclosure.

Indermaur & Thwaites' Equity, 209-211.

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[1] *Withrington* v. *Banks*, Sel. Ch. Ca., 30; *Millet* v. *Davey* (1863), 31 Beav., 470.

[2] See more fully, Indermaur & Thwaites' Equity, 206, 207.

[3] Ante, pp. 211-213.

[4] *Ex parte Fewings*, *Re Sneyd* (1884), 25 Ch. D., 338; 53 L. J., Ch., 545; 50 L. T., 109; 32 W. R., 352.

[5] *Economic Life Assurance Society* v. *Usborne*, ante, p. 452.

[6] Indermaur & Thwaites' Equity, 209-211.

is not a course usually adopted by a legal mortgagee, as sale is, in most cases, preferable. Still there may be cases in which it is best to proceed to foreclosure, *e.g.*, where the mortgagee has a scanty security, but thinks he may, as absolute owner, work it out advantageously, and desires to do things in connection with the property which he cannot safely do in his capacity of mortgagee. In the case of an equitable mortgage, foreclosure is the natural and proper remedy against the land[1]; but in any foreclosure suit the Court has statutory power to direct a sale of the mortgaged property if it thinks fit[2]. A mortgagee who has foreclosed, and thus made himself absolute owner of the property, may nevertheless sue for his mortgage money, provided he has still got the whole of the mortgaged property in his possession, but not unless, for the effect of suing after foreclosure is to re-open the foreclosure and give the mortgagor a renewed right to redeem[3]. A mortgagee, therefore, who forecloses and then sells, cannot sue the mortgagor on his covenant to pay; but if a mortgagee sells under his power of sale, he can sue for any deficiency[4]. Subject to what has just been stated, a mortgagee may exercise his various remedies, whether existing naturally, or conferred by statute, as he pleases, and even concurrently.

Enforcing an equitable mortgage.

Lockhart v. *Hardy.*

London & Midland Bank v. *Mitchell.*

If a mortgagee is in possession of mortgaged property he may maintain an action of foreclosure in respect of the property comprised in his mortgage, although his debt is statute barred. In the case referred to, the plaintiffs were equitable mortgagees by deposit of certain shares, and six years having elapsed, their debt was statute barred; but it was

[1] *James* v. *James* (1873), L. R., 16 Eq., 153; 42 L. J., Ch., 386; 21 W. R., 522.
[2] 44 & 45 Vict., c. 41, sec. 25.
[3] *Lockhart* v. *Hardy* (1846), 9 Beav., 349.
[4] *Rudge* v. *Rickens* (1873), L. R., 8 C. P., 358.

held they could, nevertheless, maintain a foreclosure action, with the view of making their title to the shares complete and realizing them[1].

Statutory powers of mortgagee.

As regards the statutory powers conferred upon a mortgagee, his power of leasing, when in possession, has already been referred to[2]. In addition, the Conveyancing Act 1881[3] confers upon every mortgagee whose mortgage is made by deed since 1881 and does not provide otherwise: (1) A power of sale[4]; (2) A power to insure against fire; (3) A power to appoint a receiver of the income; and (4) If in possession, a power to cut and sell timber and other trees which are ripe for cutting and were not planted for shelter or ornament.

Insurance.

The power to insure arises at any time after the mortgage, and any premiums paid form a charge on the property, and have the same priority, and carry the same interest as the mortgage money[5]. The insurance must not exceed the amount specified in the mortgage deed, or, if no amount is specified, must not exceed two-thirds of the amount required to restore the property in case of its total destruction[5]. There is no statutory power to insure if there is a declaration in the mortgage deed that no insurance is required, or if an insurance is kept up by the mortgagor, either in accordance with the mortgage deed or to the extent that the mortgagee would be justified in insuring for; but the mortgagee may always require any insurance money to be laid out in making

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[1] *London & Midland Bank* v. *Mitchell* (1899), 2 Ch., 161; 68 L. J., Ch., 568; 81 L. T., 263; 47 W. R., 602.

[2] Ante, pp. 472, 473.

[3] 44 & 45 Vict., c. 41, sec. 19.

[4] He can sell the mortgaged property or any part thereof. This includes a power to sell part of the land with an implied right of light over the rest (*Born* v. *Turner* (1900), 2 Ch., 211; 69 L. J., Ch., 593; 83 L. T., 148).

[5] 44 & 45 Vict., c. 41, sec. 23.

good the damage or (unless otherwise agreed) in reduction of the debt[1].

Appointing receiver.

The power to appoint a receiver does not arise until the mortgagee is entitled to sell the mortgaged property; and then he may from time to time appoint a receiver, by writing under his hand, but the receiver is to be deemed the agent of the mortgagor[2], and the mortgagor is solely liable for his acts or defaults. Such receiver has full power conferred on him to distrain and sue for rents; to retain his charges, which must not, as a rule, exceed 5 per cent. on the gross amount of all moneys received; and to keep the property insured. He must apply the moneys received: (1) In discharge of all proper outgoings in respect of the property; (2) In keeping down all annual sums and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; (3) In payment of his commission, insurance premiums, and the costs of proper repairs directed in writing by the mortgagee; (4) In payment of interest accruing due under the mortgage; and (5) Any residue must be paid to the person who, but for the possession of the receiver, would have been entitled to the income of the mortgaged property[3]. This last is the only point in which appointing a receiver may, possibly, not be so beneficial to a mortgagee as taking possession, for if he takes possession he can, as we have seen, retain any surplus. However, as a rule, where such an extreme remedy as taking possession, or appointing a receiver, is necessary, there will not be any surplus, so the point is not an important one. The practical advantage of appointing a receiver instead of taking possession is, that the mortgagee gets most of

[1] 44 & 45 Vict., c. 41, sec. 23.
[2] Consequently the mortgagor is still deemed in possession.
[3] 44 & 45 Vict., c. 41, sec. 24.

the benefits of a mortgagee in possession without incurring any of the onerous liabilities arising from that position.

Cutting timber.

The power of cutting timber[1] is a very useful supplemental power to that which a mortgagee, as we have seen[2], may possibly possess irrespective of this Act.

Power of sale.

The statutory power of sale is conferred on every mortgagee whose mortgage is by deed, but, practically, it only applies so as to enable a legal mortgagee to sell. An equitable mortgagee may be a mortgagee "whose mortgage is by deed," for he may have an equitable memorandum of security under seal; but it has been decided that he cannot, under this Act, convey the legal estate to a purchaser, unless the memorandum gives him a power of attorney to convey in the name of the mortgagor[3]. The provision is, therefore, ordinarily useless to him, and his proper course is to take proceedings in the Chancery Division to enforce his security by foreclosure, in which proceedings he may possibly obtain a sale, or, if he has a memorandum of charge or deposit containing an agreement to execute a legal mortgage, he may apply to the Court asking for a sale in a direct manner[4]; and in any sale under the Court's order, the purchaser, by the order, gets substantially the whole effect and benefit of the legal estate. The Act provides that a mortgagee shall not exercise the statutory power of sale unless and until the mortgage money has become due, *and* either (1) notice has been given requiring payment, and default has been made

Re Hodson & Howe.

When power of sale arises.

[1] Ante, p. 487.
[2] Ante, p. 484.
[3] *Re Hodson & Howe's Contract* (1887), 35 Ch. D., 668; 56 L. J., Ch., 555; 56 L. T., 837; 35 W. R., 553.
[4] *York Union Bank* v. *Artley* (1879), 11 Ch. D., 205; 27 W. R., 704.

in payment for three months after service thereof, or (2) interest under the mortgage deed is in arrear and unpaid for two months after becoming due, or (3) there has been a breach of some provision contained in the mortgage deed, or in the Act, and on the part of the mortgagor to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon[1]. Having reference to this last event on which the power of sale arises, it is manifest that, notwithstanding the power of insurance conferred by the Act, it is advisable always to insert a covenant to insure in the mortgage deed, as, if such covenant is broken, there is then an immediate power of sale. So there is if the mortgagor makes a lease under the Act and fails to deliver a counterpart to the mortgagee within one month.

Sale after notice.

If a mortgagor lets his interest get into arrear for two months, or is guilty of a breach of any covenant (other than for payment of principal or interest) in the deed or duty created by the Act, the mortgagee may at once proceed to sell without giving any notice. But in any other case the mortgagee must give three months' notice, by which he requires the mortgagor to pay the mortgage money and interest, and intimates that if this is not done within three months he shall proceed to sell. The three months must be calendar months[2], and the day on which the notice is served is excluded[3]. The notice can be waived by the persons entitled to receive it[4]. If the mortgage money is due, and then notice is given to pay at the end of three months from service of the notice, the mortgagee

[1] 44 & 45 Vict., c. 41, sec. 20.
[2] 52 & 53 Vict., c. 63, sec. 3.
[3] *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D., 204; 54 L. J., Ch., 720; 52 L. T., 731.
[4] *Re Thompson & Holt* (1890), 44 Ch. D., 492; 59 L. J., Ch., 651; 62 L. T., 651.

can sell immediately those three months are up[1]. If there are several mortgagors who have mortgaged as tenants in common, or joint tenants, notice to one will suffice for all; but if they are neither one nor the other, but are persons who have mortgaged distinct estates or interests, then, to avoid any question, notice should be given to each. If there are subsequent mortgagees, notice must be given to them as well as to the mortgagor, for the Act requires the notice to be served on the mortgagor, and defines "mortgagor" as including any person deriving title under the original mortgagor or entitled to redeem a mortgage[2]. The notice is sufficient, though only addressed to the mortgagor by that designation without any name, and is sufficiently served if it is left at the last known place of abode, or business, of the party in the United Kingdom, or affixed or left on the property, or sent by post in a registered letter, addressed to the party by name, at such last known place of abode, or business, and is not returned through the post office undelivered[3].

Improper sale.

On any sale by a mortgagee it is not, however, necessary for a purchaser to inquire whether the right to sell has properly arisen, and, in particular, whether a proper notice has been served, but he is protected, the mortgagor, or other person interested in the equity of redemption, being left to his remedy in damages against the mortgagee improperly selling[4], and the receipt of the mortgagee for the sale moneys is a sufficient discharge to the purchaser without his being concerned to inquire whether any money

[1] *Barker* v. *Illingworth* (1908), 2 Ch., 20; 77 L. J., Ch., 581; 99 L. T., 187.
[2] 44 & 45 Vict., c. 41, sec. 2 (6); *Hoole* v. *Smith* (1881), 17 Ch. D., 434; 50 L. J., Ch., 576; 45 L. T., 38.
[3] Ibid., sec. 67.
[4] Ibid., sec. 21 (2).

remains due under the mortgage[1]. If, however, a purchaser has notice of an irregularity, which is such that it cannot have been waived by the mortgagor, he cannot safely complete his purchase without requiring proof that all the persons interested have waived the irregularity[2]. Although a mortgagee cannot convey and make a good title until the three months under the notice have expired, yet it has been held that a contract to sell, entered into by him before the expiration of that period, is rendered valid by the expiration of the time if the mortgage money has not then been paid[3].

Position of mortgagee selling.

A mortgagee in selling does not stand in the position of a trustee[4]; but, at the same time, he must not act carelessly, or improvidently, and may be liable if he sells under an unnecessarily short title, or on absurdly short notice, and at a very low price, or if he causes a loss by reason of a mistake in the particulars of sale[5]. He may sell to a second mortgagee, or to the mortgagor, or to one of several mortgagors[6], or even to his own solicitor[7]. When he sells, the purchase-money must be applied in payment of any prior incumbrances, and, subject to that, is held by him in trust to be applied, firstly, in payment of the costs of the sale; secondly, in discharge of the mortgage debt, interest, and costs; and, finally, in payment to the person entitled to the mortgaged property[8]. If the mortgagee does not promptly pay over any balance in his hands, he is liable to pay interest thereon at 4 per cent. per

[1] 44 & 45 Vict., c. 41, sec. 22.
[2] *Selwyn* v. *Garfit* (1888), 38 Ch. D., 273; 57 L. J., Ch., 609; 56 L. T., 699.
[3] *Major* v. *Ward* (1846), 5 Hare, 598.
[4] As to which, see ante, pp. 64-68.
[5] *Tomlin* v. *Luce* (1890), 43 Ch. D., 191; 59 L. J., Ch., 164; 62 L. T., 18.
[6] *Kennedy* v. *De Trafford* (1897), A. C., 180; 66 L. J., Ch., 413; 76 L. T., 427.
[7] *Nutt* v. *Easton* (1900), 1 Ch., 29; 69 L. J., Ch., 46; 81 L. T., 530.
[8] 44 & 45 Vict., c. 41, sec. 21 (3).

annum[1]. Here, then, we see the mortgagee in the position of a trustee, as also is the case with regard to surplus rents when he is in possession, and with regard to the legal estate after he has been paid off, or the mortgage has been cancelled, and he has not reconveyed. To what extent mortgagee a trustee.

A transaction is sometimes seen under which a person sells and conveys property to another, who, however, gives him a right of repurchasing by a certain date. In such a case, this not being a mortgage, the observance of the date is essential, and there is no right on the part of the conveying party to have the property reconveyed to him if he has not observed it. It is advisable, in such a transaction, to clearly express that it is a sale with a right of re-purchase, and not a mortgage, and if this is not done, and the instrument is ambiguous, the following circumstances have been held to be, more or less, cogent evidence to shew that it was really intended as a mortgage, and not as an out-and-out sale, viz.: (1) That the conveying party was allowed to remain in possession, merely accounting for rents as an equivalent to interest; (2) That though the party to whom the property was conveyed was let into possession, he yet accounted for the rents and profits to the conveying party; (3) That the conveying party paid the whole costs of the instrument; (4) That the money paid was utterly inadequate as the purchase-money for the property[2]. Sale with right of repurchase.

The mortgagor, or other person interested in the equity of redemption, can usually redeem any particular mortgage; but sometimes the equity Consolidation.

[1] *Read* v. *Eley*, 76 L. T., 39, affirmed on the facts in House of Lords (1899), 80 L. T., 369.

[2] Indermaur & Thwaites' Equity, 191, 192.

doctrine of consolidation of mortgages prevents this. Consolidation is the right of a person who holds two distinct mortgages, given by the same mortgagor[1], of separate properties for separate debts, to retain both the properties until both the debts are paid, if the time fixed for redemption in each mortgage has gone by and the equities of redemption are vested in the same person. This right to consolidate any mortgage made since 1881 now depends on express contract, because section 17 of the Conveyancing Act 1881[2] enacts that if the mortgages, or one of them, be made after 1881, a mortgagor seeking to redeem any one mortgage shall be entitled to do so without paying any money due under any separate mortgage, unless a contrary intention is expressed in the mortgage deeds, or one of them[3]. It is a constant practice[4] in drawing a mortgage to insert a clause excluding this section. When the doctrine of Consolidation still applies, it exists whether the mortgages are legal or equitable[5]; and whether the properties be of the same or different kinds[6]; as against the mortgagor, or any other person in whom the equities of redemption in the different properties are all vested; and this whether the different properties were all mortgaged originally to the same mortgagee, or to different mortgagees, and have ultimately been acquired by one person[7]. But this doctrine does

Convey-ancing Act 1881.

Pledge v. *White*.

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[1] *Jones* v. *Smith* (1794), 2 Ves., Jun., 376; *Sharp* v. *Rickards* (1909), 1 Ch., 609; 78 L. J., Ch., 29; 99 L. T., 916.

[2] 44 & 45 Vict., c. 41, sec. 17.

[3] *Re Salmon* (1903), 1 K. B., 147; 72 L. J., K. B., 125; 87 L. T., 654.

[4] But the excluding clause is not technically usual in the sense that it will be ordered to be inserted in a deed given in pursuance of an undertaking to give a legal mortgage (*Farmer* v. *Pitt* (1902), 1 Ch., 954; 71 L. J., Ch., 500).

[5] *Neve* v. *Pennell* (1863), 2 H. & M., 170; *Cracknall* v. *Janson* (1879), 11 Ch. D., 1; 48 L. J., Ch., 168.

[6] A mortgage of a life policy can be consolidated with one of freeholds (*Spalding* v. *Thompson* (1858), 26 Beav., 637).

[7] *Vint* v. *Padget* (1858), 28 L. J., Ch., 21; *Pledge* v. *White* (1896), A. C., 187; 65 L. J., Ch., 449; 74 L. T., 323.

not apply to the prejudice of a person who has acquired an interest for value in the equity of redemption of one, or some, of the mortgaged properties before the mortgages have all become united in one and the same person[1]. The doctrine resting purely on principles of Equity, it has also been held that there can be no right to consolidate, unless there is default by the mortgagor on both mortgages, for, until default, there is a legal right to a reconveyance[2].

Harter v. *Colman.*

Cummins v. *Fletcher.*

Various points often arise as to priorities between different mortgagees of the same property, but the subject appertains more to Equity than to Conveyancing, so will only be briefly touched on here[3]. A first legal mortgagee has, primarily, priority, but the Court will postpone him to a subsequent mortgagee: (1) Where he has assisted in, or connived at, a fraud which has led to the creation of a subsequent interest without notice of the prior legal estate, of which assistance, or connivance, the omission to use ordinary care in inquiring after, or keeping, title deeds may be, and in some cases has been, held to be sufficient evidence, when such conduct cannot be otherwise explained; (2) Where the owner of the legal estate has constituted the mortgagor his agent, with authority to raise money, and the estate thus created has, by the fraud of the agent, been represented as being the first estate. Thus B, a legal mortgagee, lends the deeds to A, the mortgagor, and by this act enables A to represent that the estate is unencumbered and to mortgage the property

Priorities.

Indermaur & Thwaites' Equity, 214-221.

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[1] *Harter* v. *Colman* (1882), 19 Ch. D., 630; 51 L. J., Ch., 481; 41 L. T., 152; *White* v. *Hillacre* (1839), 3 Y & C., 597; *Minter* v. *Carr* (1894), 3 Ch., 498; 63 L. J., Ch., 705.

[2] *Cummins* v. *Fletcher* (1880), 14 Ch. D., 69; 49 L. J., Ch., 563; 42 L. T., 859. See further as to Consolidation, Indermaur & Thwaites' Equity, 221-224.

[3] See further, Indermaur & Thwaites' Equity, 214-221.

to C, who believes he is first mortgagee. Here B will lose his priority in favour of C. But no mere carelessness on the first mortgagee's part, unaccompanied by some active step, will be sufficient to produce this result[1]. A legal mortgagee, taking *bonâ fide* without notice of a prior equitable mortgage or charge, gains priority, on the principle that "Where the equities are equal the law shall prevail"; but if he has notice, actual or constructive, of the prior equitable interest, then he takes subject to it[2], and gross negligence on his part may be sufficient to constitute constructive notice, and deprive him of the priority he would otherwise have[3]. Generally the rule is, that if there are several mortgages on the same property, the mortgagee who has the legal estate has priority, provided he has taken *bonâ fide* without actual or constructive notice of a prior right, and provided that he has done no active step to cause him to lose his priority; and that, as regards mortgagees not having the legal estate, unless the one can shew a superior equity over the other, they all take in order of date, the maxim being *Qui prior est tempore potior est jure*. This general rule must, however, be taken subject to the well-known equitable doctrine of tacking.

Northern, &c., Co. v. *Whipp.*

Oliver v. *Hinton.*

General rule.

Tacking.

Tacking may be defined as the uniting of securities, given at different times over the same property, so as to prevent any intermediate incumbrancer from claiming a title to redeem, or otherwise to discharge, one lien which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title[4]. It depends for its validity upon the

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[1] *Northern Counties Insurance Co.* v. *Whipp* (1884), 26 Ch. D., 482; 53 L. J., 629; 51 L. T., 806.

[2] *Agra Bank* v. *Barry* (1874), L. R., 7 H. L., 135.

[3] *Oliver* v. *Hinton* (1899), 2 Ch., 264; 68 L. J., Ch., 583; 81 L. T., 212; 48 W. R., 3.

[4] Story (English edition), 264.

maxim, "Where the equities are equal the law shall prevail," and is a subject peculiarly appertaining to Equity[1]. The idea of tacking may be thus illustrated: A gives a legal mortgage for £1000 to B, then he mortgages to C for £500, and then to D for £500, but D does not know that there is any mortgage existing on the property, except to B. As matters stand, on the general rule stated in the last paragraph, C has priority over D. If, however, D can succeed in paying off B, and getting the legal estate conveyed to him, he will then squeeze out C, and gain priority. The justice of the doctrine is undoubtedly open to question, and it was abolished by the Vendor and Purchaser Act 1874[2], only to be revived by the Land Transfer Act 1875[3].

Indermaur & Thwaites' Equity, 216.

A mortgage is sometimes framed especially to secure not only money then advanced, but also further advances which it is contemplated the mortgagee shall make. In such a case the mortgagee may safely go on making the further advances if he has no notice of any intervening mortgage or charge created by the mortgagor, for though his further advance may be subsequent to another advance to the mortgagor, the doctrine of tacking protects him. If, however, he has notice of the subsequent advance, he cannot thus tack[4]. It, therefore, behoves a second mortgagee to be careful forthwith to give notice to the first mortgagee of the advance he has made. It has been decided that, although in the first mortgage the mortgagee has actually covenanted to make further advances, the position is the same, and that he cannot, after notice of a further security having

Mortgage for future advances.

Hopkinson v. *Rolt*.

West v. *Williams*.

[1] See Indermaur & Thwaites' Equity, 216-221.
[2] 37 & 38 Vict., c. 78, sec. 7.
[3] 38 & 39 Vict., c. 87, sec. 129.
[4] *Hopkinson* v. *Rolt* (1865), 9 H. L., 514; 34 L. J., Ch., 468; *Bradford Banking Co.* v. *Briggs* (1887), 12 A. C., 29; 56 L. J., Ch., 364; 56 L. T., 62.

been created, go on making his advances so as to tack them to his first advance and gain priority over the intervening security. The mortgagee is, by the mortgagor's act, discharged from his obligation to make further advances, and if he makes them he cannot gain any priority over the lender, who has, in the meantime, made an advance and given him notice[1].

Bills of sale.

A mortgage of personal chattels[2] is effected by a document which is styled a bill of sale, and it is governed mainly by the Bills of Sale Act 1882[3]. This Act provides that no such mortgage shall be valid, unless it is for not less than £30[4], and unless it is in the form printed in the schedule to the Act[5]. There must be a schedule, or inventory, of the goods annexed to the bill of sale, the consideration must be truly stated, it must be attested by a credible witness, and registered at the Central Office within seven days, and re-registered every five years[6]. If the bill of sale is not in the statutory form, or is for less than £30, it is absolutely void, not only as regards the chattels comprised in it, but so that no action can be brought on any covenant contained in it[7]. If there is no schedule or inventory, or no proper schedule or inventory, then the bill of sale is void except as against the grantor[8]. If the bill of sale is not duly attested, or not duly registered, or the consideration is not truly set forth, then it is void as regards the chattels comprised therein, but

[1] *West* v. *Williams* (1899), 1 Ch., 132; 68 L. J., Ch., 127; 79 L. T., 575; 47 W. R., 308.

[2] *I.e.*, goods, furniture and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, 41 & 42 Vict., c. 31, sec. 4.

[3] 45 & 46 Vict., c. 43.

[4] Ibid., sec. 12.

[5] Ibid., sec., 9.

[6] Ibid., secs. 4, 8, 10.

[7] *Davies* v. *Rees* (1886), 17 Q. B. D., 408; 55 L. J., Q. B., 363; 54 L. T., 813.

[8] 45 & 46 Vict., c. 43, sec. 4.

an action may be brought on any covenant[1]. A bill of sale professing to mortgage future acquired chattels is only good as against the grantor, except in two cases, viz.: (1) Actually growing crops; (2) Fixtures, plant or trade machinery, to be brought upon the premises in substitution for other fixtures, plant or trade machinery[2].

Form of money-lender's bill of sale.

The main point to be observed in drawing a mortgage bill of sale is to take care that it is strictly in the form prescribed by the Act, for if the form is departed from in any substantial particular, the instrument is absolutely void. The form is extremely simple. The instrument is made between the mortgagor of the one part, and the mortgagee of the other part, the consideration is stated, and payment thereof acknowledged, and the mortgagor assigns the chattels specified in the schedule to the mortgagee, to secure the money with interest at a certain rate per cent. per annum, and agrees that he will repay the money with the interest on a certain day. There may then be inserted any special terms, as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance[3], or defeasance, of the security. Lastly, there is a proviso that the chattels assigned shall not be liable to seizure for any causes other than those specified in section 7 of the Act[4].

[1] *Heseltine* v. *Simmons* (1892), 2 Q. B., 547; 62 L. J., Q. B., 5; 67 L. T., 611.

[2] 45 & 46 Vict., c. 43, secs. 5, 6.

[3] *E.g.*, a covenant to replace any articles worn out with others of equal value (*Seed* v. *Bradley* (1894), 1 Q. B., 319; 63 L. J., Q. B., 387; 70 L. T., 214; *Coates* v. *Moore* (1903), 2 K. B., 140; 72 L. J., K. B., 539; 89 L. T., 8).

[4] (1) Default in payment of the money, or performance of covenants. (2) If the mortgagor becomes bankrupt, or the goods are distrained on. (3) If the mortgagor fraudulently removes the goods. (4) If the grantor omits, without reasonable excuse, to produce receipts for rent and taxes. (5) If execution is levied against the goods. Even in these cases the mortgagee cannot remove the goods for five days, and within that time the mortgagor may apply to a judge for relief, who, if satisfied that the cause of seizure no longer exists, may grant relief.

Myers v. *Elliott.*

It will be seen that the form contemplates that the rate of interest shall be stated, and, therefore, if a lump sum for interest is inserted, this vitiates the bill of sale[1]. A bill of sale by way of guarantee is void, as it is not for a fixed principal sum[2]. The form gives no covenants for title, and, therefore, where the mortgagor was expressed to assign "as beneficial owner," it was held that the instrument was void, as these words would, under the Conveyancing Act 1881, imply covenants for title[3]. So, again, a bill of sale providing for payment of money "on demand" has been held void[4], as the form contemplates payment on a stated day or by stated instalments[5]. The Act contemplates that the security shall include nothing but personal chattels, and if other property is included, *e.g.*, tenant right of a farm, or goodwill, this will vitiate the instrument as a bill of sale of the chattels[6]. There is nothing in the form given by the Act as to future acquired property, and it has, therefore, been held that, though the assigning of such property is to a certain extent contemplated by the Act[7], yet if the assignment thereof is contained in the body of the bill of sale, it will vitiate it, and if such things, therefore, are assigned, it should be by the addition of proper words in the schedule[8]. If a joint bill of sale is given by two persons, who are not

Ex parte Stanford.

Cochrane v. *Entwistle.*

Thomas v. *Kelly.*

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[1] *Myers* v. *Elliott* (1886), 16 Q. B. D., 526; 55 L. J., Q. B., 233; 54 L. T., 552.

[2] *Hughes* v. *Little* (1887), 18 Q. B. D., 32; 56 L. J., Q. B., 96; 55 L. T., 476.

[3] *Ex parte Stanford, Re Barber* (1886), 17 Q. B. D., 259; 55 L. J., Q. B., 341; 54 L. T., 894.

[4] *Hetherington* v. *Groome* (1884), 13 Q. B. D., 789; 53 L. J., Q. B., 341; 54 L. T., 894. But a covenant to pay "on or before" a certain date is good (*De Braam* v. *Ford* (1900), 1 Ch., 142; 68 L. J., 82; 82 L. T., 568).

[5] *Re Cleaver* (1887), 56 L. J., Q. B., 197; *Lumley* v. *Simmons* (1887), 56 L. J., Q. B., 329; *Re Bergen* (1894), 63 L. J., Q. B., 209; *Re Wood* (1894), 63 L. J., Q. B., 352.

[6] *Cochrane* v. *Entwistle* (1890), 25 Q. B. D., 116; 59 L. J., Q. B., 418; 62 L. T., 852.

[7] 45 & 46 Vict., c. 43, secs. 5, 6.

[8] *Thomas* v. *Kelly* (1889), 13 A. C., 506; 58 L. J., Q. B., 66; 60 L. T., 114.

joint owners of the goods but each of whom is the sole owner of some of the goods, it is void, unless the schedule clearly shews what goods belong to each[1]. These are sufficient instances of decided cases, to shew how necessary it is to adhere strictly to the form given by the Act. It will be observed that the Act does not give any special power of sale to the mortgagee, but he has, naturally, a power of sale existing in him on reasonable notice, in the same way that a pledgee of goods has[2]. Having reference to this fact, it is considered that the powers conferred on mortgagees by the Conveyancing Act 1881 are not applicable to a bill of sale holder[3]. *Saunders* v. *White.*

In framing the schedule, or inventory, care must be taken to specify the various chattels, as a mere general description, *e.g.*, 450 oil paintings in gilt frames, is insufficient[4]. Schedule.

Fixtures, mortgaged by themselves, are chattels coming within the Bills of Sale Act 1882; but upon a conveyance or mortgage of land, fixtures will, in the absence of any contrary intention, pass without being specially mentioned, and this is so although they are only affixed by consent of another to whom they belong, and who has a right to remove them as against the conveying party[5]. With regard to the question of whether a mortgage of land, with fixtures, Mortgage of fixtures.

[1] *Saunders* v. *White* (1902), 1 K. B., 472; 71 L. J., K. B., 318; 86 L. T., 173.

[2] *Re Morritt, Ex parte Official Receiver* (1887), 18 Q. B. D., 222; 56 L. J., Q. B., 139; 56 L. T., 42. Compare the similar right of sale possessed by a mortgagee of stocks and shares (*De Verges* v. *Sandeman* (1902), 1 Ch., 879; 71 L. J., Ch., 378; 86 L. T., 269).

[3] Hood & Challis, 86.

[4] *Witt* v. *Banner* (1888), 20 Q. B. D., 114; 57 L. J., Q. B., 141; 58 L. T., 34. See further as to bills of sale generally, Indermaur's Common Law, 114-122; Ringwood's Bankruptcy, 101-119.

[5] *Hobson* v. *Gorringe* (1897), 1 Ch., 182; 66 L. J., Ch., 114; 75 L. T., 610. Even if affixed since the date of the mortgage (*Reynolds* v. *Ashby* (1904), 73 L. J., K. B., 946).

requires to be registered as a bill of sale, it is provided that "personal chattels" (which are the things as to which registration is required) shall not include fixtures when assigned together with a freehold, or leasehold, interest in any land, or building, to which they are affixed, except trade machinery[1]. And, even as to trade machinery, it has been decided that if it is not specially mentioned, but merely passes as incidental to the conveyance of the premises, no registration is necessary[2]. If, however, the trade machinery is specially assigned, or a power is specially given to sell it, then it is otherwise[3]. In preparing a mortgage of premises, therefore, when it is desired that the mortgagee shall have the benefit of the fixtures it is best, with regard to ordinary fixtures, to specially mention them, and give the mortgagee a power to sever them and sell them separately; but if the fixtures are trade machinery, no mention of them should be made in the mortgage, for if they are mentioned the effect is to cut them out of the security, as a bill of sale of trade machinery must not include any land[4].

Re Yates.

Johns v. *Ware.*

Document recording a pledge.

If a person lends money on the security of goods, and has the possession of the goods delivered to him, no bill of sale is required, and such a transaction is styled a pledge[5]. And a document which records the terms of a pledge and regulates the rights of the pledgee as to sale of the goods, is not a bill of sale, and requires no registration[6].

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[1] 41 & 42 Vict., c. 31 (Bills of Sale Act 1878), secs. 4, 7. See also sec. 5, defining trade machinery.

[2] *Re Yates, Batchelor* v. *Yates* (1888), 38 Ch. D., 112; 57 L. J., Ch., 697; 59 L. T., 47.

[3] *Small* v. *National Provincial Bank* (1894), 1 Ch., 686; 63 L. J., Ch., 270; 70 L. T., 492; *Johns* v. *Ware* (1899), 1 Ch., 359; 68 L. J., Ch., 155; 80 L. T., 112; 47 W. R., 202.

[4] Ante, p. 500.

[5] As to which, see Indermaur's Common Law, 125, 126.

[6] *Ex parte Hubbard, Re Hardwick* (1888), 17 Q. B. D., 690; 55 L. J., Q. B., 490; 35 W. R., 2.

Ships.

The subject of mortgages, and other dealings with ships, is governed by the Merchant Shipping Act 1894[1]. Any mortgage, or transfer, of a British ship must be by bill of sale, in the form given in that Act; it must be attested by a witness; and must be registered at the port at which the ship is registered[2]. This registration is of great importance, for, in the case of several mortgages, they will have priority, not according to the date of execution, but according to the date of registration[3]. On the discharge of a mortgage, satisfaction thereof has to be entered on the register[4].

Mortgaged land devolves on death *cum onere*.

On the death of an owner of freehold, copyhold, or leasehold property, which is subject to a mortgage, or a vendor's lien, or any other equitable charge, the person on whom it devolves takes it subject to the burden of such mortgage, lien, or charge, by virtue of the Real Estate Charges Acts[5], unless the deceased owner's will expressly states otherwise. These statutes do not, however, apply to pure personalty, and, therefore, if A specifically bequeaths furniture to B, and then gives a bill of sale over it, and dies, the amount of the bill of sale will be primarily payable out of A's general personal estate, and not out of the furniture thus bequeathed[6].

Mortgage debentures.

Before concluding this chapter, it may be advisable to refer to that kind of mortgage security known as a debenture. The word "debenture" imports an acknowledgment of a debt, but it is only a mortgage debenture which need be here noticed, and the whole subject is most properly considered in

[1] 57 & 58 Vict., c. 60.
[2] Ibid., secs. 24, 26.
[3] Ibid., sec. 33.
[4] Ibid., sec. 32.
[5] 17 & 18 Vict., c. 113; 30 & 31 Vict., c. 69; 40 & 41 Vict., c. 34.
[6] *Bothamley* v. *Sherson* (1875), L. R., 20 Eq., 304; 44 L. J., Ch., 589.

studying Company Law[1]. A mortgage debenture may be described as a charge given by a company over its property, to secure a debt, and it may comprise the whole property, real and personal, including unpaid calls, and any property which the company may from time to time be possessed of, in which case it is styled a floating charge[2]. The instrument is under the seal of the company, and, on the face of it, contains a covenant to pay principal and interest, a charge on the property, and a statement that it is issued subject to the conditions indorsed upon it. Although it includes the personal chattels belonging to the company, it does not require registration as a bill of sale[3]. Where a debenture is in the nature of a floating charge, the company may, nevertheless, dispose of the property included in it, other than land, in the ordinary course of business, and the debenture only forms a security on the assets which remain[4].

Floating charge.

Debentures are usually issued as a series, and are usually then accompanied by a trust deed, made between the company and specified persons as trustees for all the debenture holders of that series. This deed contains: (1) A legal mortgage of the company's land to the trustees, (2) a floating charge over the company's other assets, (3) power of sale for the trustees on the company's default to pay interest, repair, insure, etc. Every such mortgage debenture issued after 1900 had to be registered with the registrar of joint stock companies within 21 days after it is issued, or else the security which it gave over the company's property became void against execution creditors of the company, and

Trust deed.

[1] As to debentures generally, see Palmer's Company Law, Chap. XXXII.

[2] *Re Yorkshire Woolcombers* (1903), 2 Ch., 284; 72 L. J., Ch., 635.

[3] Bills of Sale Act 1882, sec. 17; *Re Standard Manufacturing Co.* (1891), 1 Ch., 627; 60 L. J., Ch., 292; 64 L. T., 487.

[4] *Re Florence Land Co.* (1879), 10 Ch. D., 530; 48 L. J., Ch., 147; *Government Stock Co.* v. *Manila Ry. Co.* (1897), A. C., 71; 66 L. J., Ch., 102.

against the liquidator in a winding-up[1]. And now, by the Companies (Consolidation) Act 1908[2], every mortgage or charge created by a registered company after June, 1908—which (1) secures debentures, or (2) is on uncalled capital, or (3) would be a bill of sale if given by an individual, or (4) is on land, or (5) is on book debts, or (6) is a floating charge—must be registered with the registrar of companies within 21 days after its creation; and, on default, the security which it gives on the company's property is void against the liquidator and any creditor of the company. 1908 Act.

[1] Companies Act 1900 (63 & 64 Vict., c. 48), secs. 14-18; *Re Harrogate Estates* (1903), 1 Ch., 498; 72 L. J., Ch., 313; 88 L. T., 82; *Re Yorkshire Woolcombers' Association* (1904), A. C., 355; 73 L. J., Ch., 849; 92 L. T., 777.

[2] 8 Edw. VII., c. 69, sec. 93.

CHAPTER XV.

SETTLEMENTS.

Definition of a settlement.

A SETTLEMENT may be defined as a disposition in the nature of a gift, or for valuable consideration other than on sale or mortgage, whereby property is vested in any person absolutely, or conditionally, and either directly, or through the instrumentality of trustees.

Gifts.

Every voluntary settlement is in the nature of a gift, and a gift of personal chattels may be made simply by handing over the thing given, but a voluntary promise or agreement to give is ineffectual, and this although such agreement is under seal; for, in the case of all voluntary dispositions, the Court will not give effect to them unless they are complete, and require no other act to perfect them. In other words, the Court will not give effect to any voluntary executory gift, settlement, or trust[1]. But if a settlement is for valuable consideration, it does not matter that it is executory or incomplete, for the Court will, at the instance of persons coming within the scope of the consideration, perfect and enforce it. By a settlement trusts are usually created, and it must be borne in mind that in the case of land (including leaseholds), signed writing is necessary to create an express trust[2], and, further, that any contract relating to land, or any

Indermaur & Thwaites' Equity, 37, 38.

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[1] *Ellison* v. *Ellison* (1802), 2 Wh. & Tu., 835; *Milroy* v. *Lord* (1862), 4 De G., F. & J., 264. See further as to the distinction between voluntary, executed, and executory trusts, Indermaur & Thwaites' Equity, 37, 38.

[2] 29 Car. II., c. 3, sec. 7.

interest therein, must be in writing[1]. There is nothing, however, to prevent a settlement of purely personal property being created by word of mouth. Still, writing is always advisable, and, except in the case of direct and complete gifts, is practically always used, and it is, therefore, unnecessary to specially consider a settlement created by oral arrangement. The subject of gifts, or settlements, without any instrument in writing, is, in fact, outside the scope of the present work; what we are concerned with is an instrument of settlement, though, in dealing with such an instrument of a voluntary nature, some of the points mentioned are equally applicable to cases in which there is no writing[2]. An instrument which absolutely transfers the ownership of any goods capable of complete transfer by delivery, and (if assigned apart from the land) of fixtures and growing crops, and of fixed trade machinery, is an absolute bill of sale within the meaning of the Bi ls of Sale Act 1878, unless it is an ante-nuptial settlement, or a transfer of a ship, or a bill of lading, or a warrant or order for delivery of goods[3]. Any absolute bill of sale is void against the grantor's trustee in bankruptcy and execution creditors unless it complies with the 1878 Act, as regards any goods which are left in the apparent possession of the grantor[4]. Consequently, a settlement[5] of personal chattels, unaccompanied by a manifest change of possession, requires to truly state the consideration, to be attested by a solicitor, to state in the attestation clause that the solicitor has explained it to the settlor, and to be registered in the

Goodeve's Personal Property, Chap. VI.

Bill of Sale Act 1878.

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[1] 29 Car. II., c. 3, sec. 4.
[2] As to gifts generally, see Goodeve's Personal Property, Chap. VI.
[3] 41 & 42 Vict., c. 31, secs. 4, 7.
[4] Ibid., secs. 4, 8.
[5] Unless ante-nuptial, as to which see *Wenman* v. *Lyon* (1891), 2 Q. B., 192; 60 L. J., Q. B., 663; and *Ex parte Clough, Re Reis* (1904), 2 K. B., 769; 73 L. J., K. B., 929.

Central Office within seven days of execution, and re-registered every five years; and if these requirements are not complied with it is void as against the settlor's execution creditors and trustee in bankruptcy[1].

Who may settle property.

Anyone who is capable of disposing of property is entitled to make a gift or settlement thereof, subject to the points (presently mentioned) under which a voluntary disposition is liable to be avoided. At Common Law, a settlement made by an infant is voidable by the infant after he, or she, attains the age of 21 years; but if the infant does not avoid it within a reasonable time of coming of age, then it is binding[2]. Now, however, the Infants Settlement Act 1855[3] allows a male infant at the age of 20, and a female infant at the age of 17, to make a marriage settlement, with the sanction of the Court, which, together with all covenants therein, is absolutely binding[4]; and this provision applies, not only to ante-nuptial, but also to post-nuptial settlements[5]. It is not necessary, for the validity of a settlement made under this Act, that the infant settlor should afterwards live to attain full age, except where the infant is a tenant in tail who exercises a power of appointment over the entailed land or bars the entail therein[6].

Infants Settlement Act 1855.

Details of voluntary settlements.

There is no need to discuss the form of a voluntary settlement, beyond saying that, ordinarily, the settlor

[1] 41 & 42 Vict., c. 31, sec. 8; *Davis* v. *Goodman* (1880), 5 C. P. D., 128; 49 L. J., C. P., 344.

[2] *Edwards* v. *Carter* (1893), A. C., 360; 63 L. J., Ch., 100; 69 L. T., 153; *Re Jones* (1893), 2 Ch., 461; 62 L. J., Ch., 996; 69 L. T., 45.

[3] 18 & 19 Vict., c. 43.

[4] *Re Johnson, Moore* v. *Johnson* (1891), 3 Ch., 48; 68 L. J., Ch., 499; 64 L. T., 696.

[5] *Re Sampson & Wall* (1884), 25 Ch. D., 412; 53 L. J., Ch., 457; 50 L. T., 435.

[6] *Re Scott, Scott* v. *Hanbury* (1891), 1 Ch., 298; 60 L. J., Ch., 461; 63 L. T., 800.

will be the party of the one part and the trustees of the other part. It is, however, quite possible that there are no trustees at all, but that the settlement takes the form of a simple deed of gift. The details of any voluntary settlement must depend on the wishes of the settlor in every particular case, although it is very probable that he may desire that the property should be settled very much on the same lines as if the settlement were made on a marriage, by creating a life interest for the immediate party concerned, with limitations over in favour of children. Like an absolute gift, a settlement, though voluntary, if it is complete is quite irrevocable, unless it contains, as it often does, a clause enabling the settlor to revoke it. It is generally the duty of a solicitor who is, on the instructions of a client, preparing a voluntary settlement, to point out its irrevocable character, and if this is not done, it may sometimes be set aside or rectified on the ground of mistake; and a solicitor may be liable for negligence, or breach of duty towards his client, in not having pointed out that the instrument was irrevocable, and advised, or suggested, the insertion of a power of revocation. This, however, must depend on the circumstances of each particular case, for some settlements, though voluntary, may manifestly be intended to be irrevocable, *e.g.*, where the settlement is communicated to the beneficiary, who, by reason of it, alters his position in life, and, therefore, has a right to expect that the provision made for him shall not afterwards be taken away[1]. However, a settlement or assignment of property to trustees for the benefit of creditors is revocable until communicated to the creditors, and such an instrument is said to create an illusory trust[2].

Clause of revocation.

[1] *Phillips* v. *Mullings* (1872), L. R., 7 Ch., 244; 41 L. J., Ch., 211; *James* v. *Couchman* (1885), 29 Ch. D., 212; 54 L. J., Ch., 838; 52 L. T., 344.

[2] Indermaur & Thwaites' Equity, 40, 41.

Avoidance of voluntary settlements.

Indermaur & Thwaites' Equity, 42-46.

But though a complete voluntary gift, or settlement, is irrevocable, in any direct manner, by the donor or settlor, the beneficiary is liable to lose his rights under it in any of the following ways: (1) It may be held void as a fraud upon creditors under 13 Eliz., c. 5[1]; (2) A settlement of land was formerly liable to be defeated under 27 Eliz., c. 4, by a subsequent sale of the land by the settlor, but this is no longer the case, by reason of the Voluntary Conveyances Act 1893[2], as regards sales on or since 29th June, 1893; (3) It is liable to be avoided under the Bankruptcy Act 1883[3]. It is these points which, as has been pointed out, make a voluntary settlement such a bad root of title, and oblige a vendor, who is by contract making such an instrument his root of title to specify its nature[4].

Bankruptcy Act 1883, sec. 47.

Of the foregoing three points of danger in connection with voluntary settlements, the last-mentioned is the most important. The Bankruptcy Act 1883 provides[3] that if a person who has made a settlement or disposition of property—not being a settlement in consideration of marriage, or in favour of a purchaser[5] or incumbrancer in good faith and for value, or a settlement on wife or children of property accrued to the settlor after marriage in right of his wife—becomes bankrupt within two years, it shall be void against the trustee in his bankruptcy; and even if his bankruptcy occurs after two but within ten years, it shall also be void unless complete solvency on the part of the donor, or settlor, at the

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[1] Ante, pp. 279, 348, and see further hereon, Indermaur & Thwaites' Equity, 42-46.

[2] 56 & 57 Vict., c. 21. Ante, pp. 279, 348.

[3] 46 & 47 Vict., c. 52, sec. 47. Ante, pp. 279, 348.

[4] See ante, pp. 279, 347, and *Re Marsh & Earl Granville* there quoted.

[5] A person who releases a right or compromises a claim is just as much a purchaser for this purpose as one who gives money or physical property (*Re Pope, Ex parte Dicksee* (1908), 2 K. B., 169; 77 L. J., K. B., 767; 98 L. T., 775).

time can be shewn, and also that the property comprised therein then passed[1]. The fact, however, that a person takes under a voluntary settlement does not prevent him disposing of the property, and conferring a good title thereto, if he does so before the settlor has become a bankrupt[2]. If a voluntary settlement is avoided under the Bankruptcy Act 1883, by the settlor's bankruptcy, it does not, necessarily, vest the settled property in the trustee in the settlor's bankruptcy, for if there are subsequent estates or interests created for value, the effect will firstly be to accelerate and improve their positions. Thus suppose A makes a voluntary settlement on B, and then mortgages to C, here C is entirely subject to B's prior rights; but if within two years A is bankrupt, and the settlement on B is avoided by the trustee in A's bankruptcy, C has first to be disposed of before such trustee will take[3].

Sanguinetti v. *Stuckey's Banking Co.*

Turning now to settlements for value, it may be observed that they may be for all sorts of considerations, *e.g.*, settlements by way of family compromise, and generally for the extinguishment, or adjustment, of disputes between parties; but practically the most important settlements for value are those made on marriage. Such settlements are sometimes preceded by marriage articles, *i.e.*, an agreement for settlement, but this is not usually the case. But if parties are marrying hurriedly, and there is no time to draw up and execute a proper settlement before marriage, then articles should be executed, as otherwise, if the parties leave the execution of the settlement until after marriage, it will be merely a

Settlements for value.

[1] A declaration that the settlor henceforth holds the property upon the trusts of the settlement is a sufficient passing of the property for this purpose (*Shrager* v. *Marsh* (1908), A. C., 402; 77 L. J., P. C., 105; 99 L. T., 33).

[2] See ante, p. 348, and *Re Carter & Kenderdine* there quoted.

[3] *Sanguinetti* v. *Stuckey's Banking Co.* (1895), 1 Ch., 176; 64 L. J., Ch., 181; 71 L. T., 872; 43 W. R., 154.

Articles and settlement.

voluntary disposition. If, however, articles are executed before marriage, then, although the settlement is a post-nuptial one, it has relation back to the articles, and is deemed to have been made before marriage. If marriage articles are executed, and then afterwards a settlement, and the trusts or limitations differ, and both were executed before marriage, the settlement governs, as being the final and complete instrument, unless it is expressed to be made in pursuance of the articles, in which case the articles govern. If, however, the articles are executed before marriage, and the settlement afterwards, then the articles govern, and, in so far as there is any difference, the settlement must be made to conform to the articles, because the parties married on the faith of the articles. The articles form the executory trust, and the settlement the executed trust. There is also this difference in construction, that whilst a settlement is to be construed strictly, articles may be construed liberally, according to the intention of the parties[1].

Indermaur & Thwaites' Equity, 48-49

Three kinds of marriage settlement require to be specially considered. These are: (1) An ordinary settlement of personal property; (2) A trader's settlement of land; (3) A strict settlement of land.

1. Ordinary settlement of personalty.

The following is a brief epitome of the most important parts of a marriage settlement of personal property:—

1. Date and parties — (1) Intended husband, (2) intended wife, and (3) the trustees.

2. Recital of intended marriage, and of arrangements for settlement, which may be of property of intended husband, or wife, or of both.

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[1] *Lord Glenorchy* v. *Bosville* (1733), 2 Wh. & Tu., 763. See Indermaur & Thwaites' Equity, 48, 49.

3. Testatum, in consideration of intended marriage, the settlor assigns the property to the trustees, upon trust for the settlor until the marriage; and then

4. In trust to pay the income to the husband and wife successively for life, giving the first life interest to the person bringing in the property, and as to the lady, without power of anticipation;

5. And on the death of the survivor, in trust for the child, children, or remoter issue of the marriage, as the husband and wife jointly by deed, or the survivor by deed or will, shall appoint.

6. And, in default of appointment, for the children equally—sons at 21, and daughters at that age or marriage; with a hotchpot clause.

7. Trust, in default of children—(*a*) if it is of the husband's property, to him absolutely; but (*b*) if it is of the wife's property, then in trust for her absolutely, if she survives the husband; and if she does not survive the husband, in trust as she by will appoints and, in default of such appointment [in trust for her grandchildren born in her lifetime who attain 21[1], and in default of such grandchildren] in trust for the persons who, under the Statutes of Distribution, would on her decease have been entitled thereto if she had died possessed thereof intestate and without ever having been married.

8. Advancement clause.

9. Special powers of investment, declaration as to the appointment of new trustees, and any other special clauses that may, under the circumstances, be advisable, *e.g.*, if one of the trustees is a solicitor, a power enabling him to charge for professional services.

10. Proviso avoiding the settlement, should the marriage not be solemnized within a year[2].

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[1] The clause in brackets is sometimes put in, see 2 Prideaux, 255.
[2] For precedents, see 2 Prideaux, 300, 306.

Vesting property in the trustees.

With regard to the vesting of the property in the trustees, this is, in the above epitome, effected by an assignment in the deed. If, however, the property consists of stocks or shares, it is usual to transfer them into the names of the trustees before the execution of the settlement, and recite that this has been done, and simply then proceed to declare the trusts. If, however, the property does not consist of stocks or shares, then the form will be as given above, and it will be observed, not only with regard to this particular kind of settlement, but as regards settlements generally, that the person who is settling the property is expressed to convey "as settlor." This implies, not the ordinary covenants for title, as in the case of a sale[1], but merely a covenant for further assurance by the settlor and persons claiming under him. It is almost the universal practice, in all settlements, to make the settlor convey merely "as settlor," and not "as beneficial owner."

As to covenants for title.

Trust until marriage.

The settlement being made before the marriage, it is, of course, proper to formally create a trust in favour of the party bringing in the property, until the marriage happens, and equally, of course, the proviso with which the settlement concludes is necessary, so as to nullify the instrument should the marriage, through any unforeseen circumstances, not be solemnized.

Life interests.

The general rule is, to give the first life interest in the property settled to the party bringing it into settlement; but should the wife have no property, or, though she has property, should the first life interest therein be given to the husband, a provision may properly be inserted, for the payment to the wife, during marriage, of a yearly sum in the nature

[1] Ante, p. 372.

of pin money. It does not, however, follow that, because the property being settled is the husband's, he should necessarily have the first life interest. He may be a man engaged in business, or whose position is not secure, in which case, in view of the possibility of his bankruptcy, or alienation by his own act, or by operation of law, it may be advisable to give the first life interest to the wife. This is, in such a case, the best plan, for to give the first life interest to the husband, with a trust over on his bankruptcy, or alienation, is by no means always satisfactory. No doubt, although the property comes from the husband, such a trust over in favour of the wife is good against any voluntary alienation on his part[1], or even an involuntary alienation produced by judgment and execution[2]. It is not, however, good in the event of his bankruptcy[3], unless he received money on the marriage from his wife, in which case, to the extent of what he so received, the trust over to the wife, on bankruptcy, will be good[4]. In the same way, it does not follow that, necessarily, because the property comes from the wife, she should have the first life interest therein; and it must here be observed that, if the first life interest is given to the husband, a trust over on his bankruptcy, to the wife, is perfectly good, as it is, indeed, in every case of property settled by anyone other than the life tenant himself[5]. Where property is brought in by the wife, or some person other than the husband, and the first life interest is given to the husband, the proper way of protecting the wife, and, in a practical sense, the husband also, is to limit it over to the wife in case the husband shall assign, mortgage, or in any

Gift over on bankruptcy or alienation.

Re Detmold.

Mackintosh v. *Pogose.*

[1] *Brooke* v. *Pearson* (1859), 27 B., 181; *Knight* v. *Browne* (1861), 30 L. J., Ch., 649.
[2] *Re Detmold* (1889), 40 Ch. D., 585; 58 L. J., Ch., 495; 61 L. T., 21.
[3] *Higinbotham* v. *Holme* (1811), 19 Ves., 88.
[4] *Mackintosh* v. *Pogose* (1895), 1 Ch., 505; 64 L. J., Ch., 274; 72 L. T., 251.
[5] *Dommett* v. *Bedford* (1796), 3 Ves., 149.

way anticipate the income, or shall do or suffer anything whereby he shall cease to be entitled to receive the same[1].

Anticipation clause.

With regard to the lady's life interest during coverture, that should always be limited to her without power of anticipation, the effect and advantage of which clause has already been referred to[2]. Under it she is secure in her receipt of the income, notwithstanding the persuasion or pressure of her husband, and should she become a bankrupt the income will not pass to the trustee in her bankruptcy, but will still be received by her during the coverture[3].

Provision for children.

After the deaths of the husband and wife, naturally the next limitation is to the children, but it will be observed that the parents have jointly during their lives, and on the death of one the survivor has, a

Appointment.

right or power of selection. This power extends, not merely to enable the parents to appoint to children, but remoter issue (grandchildren), which is advisable, for in default of appointment the children take equally, and no grandchild would participate under this limitation. Suppose there are three children of the marriage, A, B, and C, and A dies leaving issue, if the property is left to go in default of appointment, B and C will take the whole, but under this power the parents can make an appointment

Re Bowles.

to the children of A. Again, the parents might appoint, say, a fourth share in trust for X, a child of the marriage, for life, and then in trust absolutely for such children of X as are born in the lifetime of the parents or the survivor and attain 21—for these limitations would not transgress the perpetuity rule

[1] See 2 Prideaux, 325-328; 2 K. & E., 536-540; or *Re Detmold*, ante, p. 515.

[2] Ante, p. 223.

[3] 45 & 46 Vict., c. 75, sec. 19; *Re Wheeler*, *Briggs* v. *Ryan* (1899), 2 Ch., 717; 68 L. J., Ch., 663; 81 L. T., 172.

supposing they had been inserted in the marriage settlement[1]. Any exercise of the power of appointment by the parents must be *bonâ fide*, and not a fraud upon the power[2], but the appointment of an illusory, or nominal, share to any child, is perfectly good[3], as also is an appointment of the whole trust fund to one child only[4]. With regard to the limitation to the children in default of appointment, such limitation is almost invariably made so as to confer vested interests on sons who attain 21 years of age and on daughters who attain that age or marry under it, though sometimes a proviso is added that such marriage must be with the consent of the parents, or surviving parent.

Indermaur & Thwaites' Equity, 270-275.

Maintenance.

It may be observed that if the trust is framed in this way, there is no occasion to insert an express trust, or power, for maintenance as was formerly done. The object of this clause was to enable the trustees, should the parents die before any child had acquired a vested interest, to apply the income of his or her presumptive share for his or her maintenance, until the share became vested. The Conveyancing Act 1881[5], however, provides that where property is held in trust for an infant, whether absolutely, or contingently on attaining 21 or on any event before attaining that age, the trustees may, at their discretion, apply the income for the infant's maintenance. This provision, however, only applies where the infant takes a vested interest at a period not later than the age of 21, and if, by the settlement, the vesting of the shares should be postponed to a later time (*e.g.*, until 25, which is often

Conveyancing Act 1881, sec. 43.

Re Judkin.

[1] *Re Bowles, Amedroz* v. *Bowles* (1902), 2 Ch., 650; 71 L. J., Ch., 822; 51 W. R., 124.
[2] Indermaur & Thwaites' Equity, 270-275.
[3] 1 Wm. IV., c. 46.
[4] 37 & 38 Vict., c. 37.
[5] 44 & 45 Vict., c. 41, sec. 43.

the case in a will), then this enactment would not apply and the maintenance clause should still be inserted[1]. If on the death of the parents there are several children all infants, or some of age and some infants, there was, for some time, considerable conflict of judicial opinion as to the exact position.

Re Holford. But now it is definitely decided that the child who first attains the age of 21 years, or being a daughter marries, acquires but a vested interest in an aliquot share, and has no right to more than the income on that share, and that the other children who have not yet obtained vested interests can still be maintained out of the remainder of the fund[2]. The statutory provision in the Conveyancing Act 1881 may therefore safely be relied on, for it will be observed that it applies not only to cases in which an infant is absolutely, but even contingently, entitled on the happening of the future event[3]. Any income which is not applied for maintenance under the section is to be accumulated and paid to the person who, in the events which happen, becomes ultimately entitled to the capital from which such income is

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[1] *Re Judkin* (1884), 25 Ch. D., 743 ; 53 L. J., Ch., 496 ; 50 L. T., 200.

[2] *Re Holford* (1894), 3 Ch., 30 ; 63 L. J., Ch., 637 ; 70 L. T., 777 ; 42 W. R., 363.

[3] The above remarks as to maintenance are equally applicable to provisions made by will, but it should be observed that if an infant, on attaining 21, only becomes entitled to the corpus of the property, and not to the income accrued during infancy, that being given over to some other person, then there is no power, under section 43 of the Conveyancing Act 1881, to use the income of the property for the infant's maintenance (*Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D., 331 ; 54 L. J., Ch., 510 ; 52 L. T., 507). Further, it must he noticed that the principle of the case of *Re Holford* quoted supra only applies to personalty. In *Re Averill, Salsbury* v. *Buckle* (1898), 1 Ch., 523 ; 67 L. J., Ch., 233 ; 78 L. T., 320 ; 46 W. R., 460, it was held that where real estate is vested in trustees in fee, upon trust for a tenant for life, and after his death for the children of such tenant for life who attain 21, and the tenant for life dies leaving children, all infants, the persons entitled to the income will be the same as if the contingent remainders had been legal instead of equitable, *i.e.*, while all are infants all can be maintained, but the first child of the tenant for life who attains 21 will thenceforth take the whole income subject to the divesting of proportionate parts thereof as the other children attain 21.

derived; thus the accumulated income of each child's share will not belong to that child at 21, if the share is given by a will which directs the share to be held in trust for the child for life, and then for its children, but will form part of the capital[1]. *Re Bowlby.*

As the children have no certain rights under the settlement, but are subject to the power of appointment vested in their parents, it follows that though a child has attained 21, and will, therefore, get a share of the fund if no appointment is made, yet he has no tangible interest capable of sale or mortgage. If, therefore, a child desires to raise money on his prospective interest in the settled fund, there are but two ways of doing it, viz.: (1) The parents may irrevocably appoint a certain share to the particular child; or (2) The parents may release the power of appointment, when the child at once acquires a vested interest in default of the execution of the power, which has thus become incapable of being exercised[2]. Child's position with regard to his future interest.

The next clause in the settlement is what is known as the hotchpot clause. The parents may, for some reason, *e.g.*, on the marriage of a child, or with the view of assisting a child in the world, make an appointment to such child of a portion of the fund, so as to at once give him, or her, a certain interest therein on their deaths, or even possibly to further assist, they may give up their life interests in the portion of the fund appointed, so that the child shall at once have it in possession. They may then die without making any appointment of the remainder Hotchpot clause.

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[1] *Re Bowlby* (1904), 2 Ch., 685; 73 L. J., Ch., 810; 91 L. T., 573, overruling *Re Scott* (1902), 1 Ch., 918; 71 L. J., Ch., 475; 86 L. T., 348.

[2] 44 & 45 Vict., c. 41, sec. 52; *Re Somes* (1896), 1 Ch., 250; 65 L. J., Ch., 262; 74 L. T., 49. See Indermaur & Thwaites' Equity, 272-274.

of the fund, in which case, in the absence of any provision to the contrary in the settlement, the child to whom the appointment has been made would, in addition to the benefit he has already received, be also entitled to take an equal share in the remainder of the settlement fund. To prevent this, the settlement always provides that no child to whom an appointment has thus been made shall share in the unappointed part of the fund without bringing into the common lot the sum which has been thus appointed. There is no obligation to bring it in, but if this is not done, the child cannot participate, and it is, therefore, for such child to consider which is most beneficial[1].

Trusts in default of issue.

It will be observed that the trust in default of children differs somewhat, according to whether it is the wife's or the husband's property. The trust, if it is the husband's property, is to him absolutely, so that it would pass under a disposition in his will, or would go to his next-of-kin. So also if the property comes from the wife, and she survives the husband, it is limited to her absolutely; but if she dies before the husband, without appointing by will and without grandchildren who take, the property is limited so as to devolve upon those persons who, under the Statutes of Distribution, would, on her decease, have been entitled thereto if she had died possessed thereof intestate and without ever having been married. *Re Brydone.* The object is to exclude the husband from taking the fund absolutely either on his wife's death or on the death of any child of the marriage who may survive the wife but afterwards die without having attained a vested interest under the previous trusts[2], and the above appears to be the proper language to adopt to prevent any doubt on the point. Thus, suppose the

[1] As to hotchpot on an intestacy, see ante, p. 235.
[2] *Re Brydone* (1903), 2 Ch., 84; 72 L. J., Ch., 528; 88 L. T., 614.

words "without having been married" were left out of the limitation, and the wife dies, leaving her husband and an infant child, and that child afterwards dies under 21, the husband would then get the fund as next-of-kin of the child[1].

Advancement.

The Conveyancing Act 1881, though conferring, as we have seen, a power of maintenance, confers no power of advancement, and, therefore, it is necessary to insert an advancement clause. The parents may die, and before a child has attained a vested interest a sum of money may be required for various purposes, *e.g.*, to put him out in the world. The settlement, therefore, enables the trustees to raise a portion of the child's presumptive share for the purpose, the usual practice being to limit this power to one-half of the presumptive share. This power of advancement is also, ordinarily, so framed as to enable an advancement to be made, not only by the trustees after the death of the parents, but, also, during the lives of the parents, with their consent, or the consent of the survivor. This is advisable because, although the parents have a power of appointment amongst their children, this power is usually limited to take effect not earlier than the attainment of 21 years, or, in the case of daughters, the attainment of that age or marrying under it. If there is no such restriction, but the power to appoint is general, or if a child has attained 21, or, being a daughter, has married, the parents can, by appointing, produce the same result as can be attained by means of the advancement clause.

Investments and

An investment clause need not be inserted unless the parties wish to vary or extend the power of investment conferred on trustees by the Trustee Act 1893[2].

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[1] 2 Prideaux, 254; 2 K. & E., 549, 550.
[2] Ante, pp. 63, 64.

appointment of new trustees.

This Act also confers powers of appointment of new trustees[1], and it is only, therefore, usual to declare that this power of appointing new trustees shall be vested in the husband and wife during their joint lives, and in the survivor during his or her life.

Covenant to settle after acquired property.

A clause that is very commonly inserted in the settlement, although we have not included it in our epitome of the contents, is a covenant to settle after acquired property. It is not, however, usual to make this covenant by the husband[2] as regards his future property, for to do so might seriously hamper him in the future; and when the husband does so covenant, it is generally to settle his future acquired property with some substantial exception, *e.g.*, except business assets. But a covenant to settle the wife's future acquired property is often met with. The clause is not a usual common form clause[3], and the client should be asked for instructions about it. Its object is to secure the property for the children.

Form of covenant.

The covenant to settle the future acquired property of the lady should, when inserted, take the shape of a general agreement between the parties that all real and personal property to which the lady may thereafter become entitled during the coverture, whether in possession or reversion, except any property acquired at one time not exceeding a stated amount (usually £200), shall be brought into the settlement and be held on the trusts thereof[4]. Being thus framed as a general agreement, the covenant binds both the husband and wife[5], whereas if the wife alone covenants she only is bound. If the settlement

[1] Ante, p. 58.
[2] For example of such a covenant by a husband and its effect, see *Re Reis, Ex parte Clough* (1904), 2 K. B., 769; 73 L. J., K. B., 929.
[3] *Re Maddy* (1901), 2 Ch., 821; 71 L. J., Ch., 181; 85 L. T., 341.
[4] See 2 Prideaux, 308, or 2 K. & E., 575-581.
[5] *Ramsden* v. *Smith* (1854), 2 Drew, at 309; 23 L. J., Ch., 757.

is made since 1882 and the wife is of full age, her covenant is in all cases sufficient.

Formerly, if a man on marriage with an infant woman settled property on her and there was a mutual agreement to settle the lady's future acquired property, the husband's covenant was effectual to bind all interests in property to which the husband's common law rights applied, but it could not, of course, bind any future property expressly given to her for her separate use, or the inheritance in her future acquired realty. Neither did the lady's own covenant bind these two things, because she was an infant when she covenanted. Consequently, as regards these two things, the lady had a right, within a reasonable time after attaining full age and becoming entitled to either of them, to repudiate her covenant and elect to retain these two things for herself outside the settlement. But in the event of her so doing, the Court of Chancery compelled her to make compensation by forfeiting so much of the benefits in her husband's property given to her by the settlement as would represent the value of the after acquired property in respect of which she repudiated the settlement[1]; except, indeed, where the only benefit she took in her husband's property by the settlement was a life interest without power of anticipation, in which case she could repudiate her covenant and yet retain that life interest[2].

One would naturally have expected that the Married Women's Property Act 1882, by creating statutory separate estate, would have altered the law as stated in the previous paragraph, and made the husband's covenant to settle the future acquired

[1] *Willoughby* v. *Middleton* (1862), 31 L. J., Ch., 683; *Codrington* v. *Codrington* (1873), 7 H. L., 854; 45 L. J., Ch., 660.

[2] *Smith* v. *Lucas* (1881), 18 Ch. D., 531; *Re Vardon's Trusts* (1886), 31 Ch. D., 275; 55 L. J., Ch., 259; 53 L. T., 895.

personalty of his wife of no utility. Such, however, was not the case. Section 19 of the 1882 Act provides that nothing in that Act shall interfere with or affect any settlement, or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman. And it was decided[1] this section means that the 1882 Act does not invalidate or render inoperative anything which would have been valid and operative before the Act. In other words, the husband's covenant to settle his wife's future acquired property has the same binding effect on personalty, which is simply statutory separate estate under the 1882 Act, as if it were not separate estate at all. This was illustrated in *Stevens* v. *Trevor-Garrick*[2], in which by ante-nuptial settlement made in 1891 it was mutually agreed between the husband and his infant wife that £1000, to which the lady would become entitled at 21, should be assigned to the trustees on the trusts of the settlement, and it was held that the husband's covenant bound the money by reason of the above section 19, and the lady could not avoid it.

Now, however, a change in the law has been made by the Married Women's Property Act 1907[3], as regards every settlement made after 1907. This Act provides that, notwithstanding section 19 of the 1882 Act stated in the preceding paragraph, a settlement or agreement for a settlement made after 1907 by the husband, whether before or after marriage, respecting the wife's property, shall not be valid unless: (1) it is executed by her if of full age, or (2) it

[1] *Re Armstrong, Ex parte Boyd* (1888), 21 Q. B. D., 264; 57 L. J., Q. B., 553; 59 L. T., 806; 36 W. R., 772.

[2] (1893), 2 Ch., 307; 62 L. J., Ch., 660; 69 L. T., 11; followed in *Buckland v. Buckland* (1900), 2 Ch., 86; 69 L. J., Ch., 648; 82 L. T., 759.

[3] 7 Edw. VII., c. 18, sec. 2.

is confirmed by her after full age. But if the wife dies an infant, the husband's covenant shall bind any interest in her property to which he may become entitled on her death and which it would have bound but for this 1907 Act. And this 1907 Act does not in any way affect a settlement made under the Infants Settlement Act 1855[1].

Extent of the covenant.

A covenant to settle after acquired property binds property which the married woman becomes entitled to, but which does not fall into possession until after her death[2], but it does not bind property which does not fall into possession until after the death of the husband[3]. The covenant is inoperative to bind property which the woman becomes entitled to as tenant in tail[4]. It does not (unless special words are used for the purpose) bind property in respect of which the wife acquires a power of appointment[5], or a life interest[6], or annuity for her life[7], or property acquired after a judicial separation[8]. The covenant does bind property which the husband himself gives to the wife during the coverture[9]; but does not bind property given by the husband's will to the wife[10], nor savings out of separate estate[11]. If property is given to a married woman with a declaration that it

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[1] As to which, see ante, p. 508.
[2] *Fisher* v. *Shirley* (1890), 43 Ch. D., 290; 59 L. J., Ch., 29; 61 L. T., 668.
[3] *Re Coghlan* (1894), 3 Ch., 76; 63 L. J., Ch., 671; 71 L. T., 186.
[4] *Hilbers* v. *Parkinson* (1884), 25 Ch. D., 200; 53 L. J., Ch., 194; 49 L. T., 502.
[5] *Ewart* v. *Ewart* (1853), 11 Hare, 279.
[6] *Townshend* v. *Harrowby* (1858), 4 Jur. (N. S.), 353; 27 L. J., Ch., 553.
[7] *Re Dowding* (1904), 1 Ch., 441; 73 L. J., Ch., 194; 90 L. T., 82.
[8] *Davenport* v. *Marshall* (1902), 1 Ch., 82; 71 L. J., Ch., 29; 85 L. T., 340.
[9] *Ellis* v. *Ellis* (1909), 1 Ch., 618; 78 L. J., Ch., 375; 100 L. T., 511.
[10] *Coles* v. *Coles* (1901), 1 Ch., 711; 70 L. J., Ch., 324; 84 L. T., 142. See also *Re Simpson* (1904), 1 Ch., 1; 73 L. J., Ch., 53; 89 L. T., 542.
[11] *Re Clutterbuck* (1905), 1 Ch., 200; 73 L. J., Ch., 698.

shall not be bound by a covenant she has entered into to settle after acquired property, this declaration is of no effect, and the property is controlled by the covenant[1]. The covenant does not bind immoveable property situate in a country where trusts are not recognized[2].

Different kinds of personal property may be settled.

Various kinds of personal property are often settled on marriage, *e.g.*, stock, shares, furniture, policies of insurance, and reversionary interests. It has already been noticed that an ante-nuptial settlement of furniture does not require to be registered as a bill of sale[3]. Where there is little or nothing else to settle, it is often advisable that the intended husband should insure his life and settle the policy of insurance. Thus he may be a man in business, earning a considerable income, but unable to withdraw money from his business to make a settlement, and yet well able to keep up the premiums on a policy of insurance. In such a case the husband should, of course, covenant to keep up the insurance, and it is well to insert a clause enabling him at any time to pay to the trustees a sum equal to the policy, in which case the policy is to be held for him absolutely. A clause should be inserted relieving the trustees from any responsibility to see that the policy is duly kept on foot[4]. If furniture is settled, it should be provided for the wife to have the use and enjoyment of it during her life, and at her death for her husband to have such use and enjoyment, and that it shall only be sold by the consent of the wife during her life, and after her death by the consent of the husband during his life,

Policy of insurance.

Furniture.

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[1] *Schofield* v. *Spooner* (1884), 26 Ch. D., 94; 53 L. J., Ch., 777; 51 L. T., 138.

[2] *Re Pearse* (1909), 1 Ch., 304; 78 L. J., Ch., 73; 100 L. T., 48.

[3] Ante, p. 507.

[4] For precedent, 2 Prideaux, 310.

but that after the death of the survivor it may be sold at the discretion of the trustees; the general trusts being similar to those in any other settlement of personalty, for whatever the personal property that is being settled may be, the general trusts and details are as indicated in our epitome of the outline of a settlement of personal property.

2. An ordinary or trader's settlement of land.

When on a person's marriage the property desired to be settled is real property, it is necessary to consider whether it shall be settled in strict settlement, or by way of a trader's settlement, a term used in contradistinction to a strict settlement, and which, perhaps, tends to shew the origin of such a settlement. A landed proprietor would naturally desire his estate to be kept in his family, and with that view would entail it, but a trader possessed of land would not be supposed to have any such desire. At the present day, whether a man is a trader or not, unless there is some reason for entailing, it is usual to settle land not in strict settlement, but by way of a trader's settlement. Thus, if A is possessed of six freehold houses in Whitechapel, he can, ordinarily, have no desire to keep them in his family, only valuing the houses as an income-producing property, and, therefore, it would be proper to have recourse to a trader's settlement. If, however, A is possessed of an estate which has been in his family for years, or he is desirous of creating and establishing a family estate, then the proper course would be to settle the property by strict settlement. The theory of a trader's settlement is, to treat the property settled as if it were personalty, and to settle it substantially in the same manner. The equitable doctrine of constructive conversion[1] comes to the assistance of

[1] As to conversion, see Indermaur & Thwaites' Equity, Part III., Chap. III.

the conveyancer, and enables him to produce the same results as if the land were actually sold and he were dealing with the proceeds.

Two deeds usual in a trader's settlement.

In a trader's settlement it is usual, though not actually necessary, to carry out the transaction by means of two deeds. The first deed is a conveyance to the trustees upon trust for sale (which produces a constructive conversion), and the other deed contains the detailed trusts. It seems best, except where the property is very small, to have two deeds, as any purchaser, on a sale, cannot then possibly be charged with any duty, or obligation, in connection with the trust, and in fact on a sale by the trustees only the deed of conveyance upon trust for sale need be abstracted, and the trustees will give that deed to the purchaser and be able to retain the deed setting out the trusts.

The following is a brief epitome of the conveyance on trust for sale :—

Epitome of conveyance in trust for sale.

1. Date and parties — (1) Intended husband, (2) intended wife, and (3) the trustees.

2. Testatum, that in pursuance of an agreement and in consideration of intended marriage, the conveying party "as settlor" conveys to the trustees.

3. Parcels.

4. Habendum. To hold to the trustees in fee simple, to the use of the settlor in fee simple until the marriage, and then to the use of the trustees in fee simple.

5. Upon trust for sale of the property, with the consent in writing of the husband and wife, or the survivor of them, and after the deaths of husband and wife, at the discretion of the trustees.

6. Declaration that the trustees shall stand possessed of the net proceeds of the sale, and, until sale, of the rents and profits, upon the trusts declared by

an indenture of even date, and that, throughout, the property shall be deemed, and shall devolve as, personalty.

7. Power to the trustees to lease, and generally to manage the property until sale.

The accompanying deed.

It is not necessary to give an epitome of the other deed that is simultaneously executed, as it is in effect the same as an ordinary settlement of personal property. The result of the two deeds is, that the land is constructively converted, but yet it is not actually converted, and may perhaps for a long time be kept as it is, but the property is entirely treated as personalty, and for all ordinary purposes a marriage settlement of personalty is a far more equitable arrangement than is a strict settlement of realty[1].

Settled Land Act 1882, sec. 63.

We see here, then, that the trustees have a power of sale, and in connection with that it is necessary to consider what effect the Settled Land Act 1882 has upon the position. Section 63 of this Act expressly deals with such a conveyance upon trust for sale as forms the first part of a trader's settlement. It provides that whenever land is subject to a trust or direction for sale and for application of all or any part of the sale money, or of the income thereof, or of the income of the land until sale, for the benefit of one or more persons for life or for any other limited period, then the person beneficially entitled in possession to the income of the land until sale shall have all the statutory powers of a tenant for life. Hence the tenant for life has the statutory power of sale; and by section 56 of the 1882 Act, if the settlement merely gave the trustees a discretionary trust or power to sell, they could not sell without his consent,

[1] For short precedents of the above two deeds, see Clarke's Students' Precedents, 93, 96.

although he could sell without their consent, but if the trustees had a positive duty to sell, they could do so without the tenant for life's consent[1]. The difficulties thus raised have now been removed by the Act of 1884 next dealt with.

Settled Land Act 1884, secs. 6, 7.

The Settled Land Act 1884 provides that in the case of such a settlement as we are dealing with, any consent not required by the terms of the settlement is not, by force of the 1882 Act, to be deemed necessary to enable the trustees to exercise any of the powers conferred by the settlement[2]. Clearly, therefore, not only can the trustees exercise the power of sale, but also the power of leasing, which is given in our epitome of the deed of conveyance upon trust. The Act of 1884 further provides that the statutory powers which section 63 of the 1882 Act confers on the person having the present beneficial interest by making him the technical tenant for life, shall not be exercised without an order of the Court; and that when such order is made the trustees shall have no further power of sale so long as it remains in force. Any such order must be registered as a *lis pendens*, and until so registered it in no way affects a person buying from the trustees[3]. Consequently, on a sale of property comprised in a trader's settlement, the trustees are primarily the persons to convey to a purchaser, subject to any consent of the beneficiaries which may be required by the deed itself; but if the tenant for life has obtained an order giving him liberty to sell, and has registered it as a *lis pendens*, then the tenant for life is the person to sell and convey. If the tenant for life is absolutely entitled to the immediate life interest without any

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[1] *Taylor* v. *Poncia* (1884), 25 Ch. D., 646; 53 L. J., Ch., 409; 50 L. T., 20.

[2] 47 & 48 Vict., c. 18, sec. 6.

[3] Ibid., sec. 7.

charge or interest existing in any other person, the Court will generally, on application, make such an order[1].

Another mode of framing the conveyance upon trust for sale.

Bearing in mind that the tenant for life may, by a successful application, override the powers of the trustees, it may be deemed advisable to so frame the conveyance upon trust for sale as to leave matters, during the husband's life, entirely in his hands, and thus avoid any application for leave to sell. It is conceived that if a person other than the husband or wife (*e.g.*, a father or other relative) is really providing the property that is being settled, such person would prefer that the trustees should primarily have control, and the deed should be framed as given in our epitome of it. But if a husband is settling his own property, he may prefer to retain the management of it during his life, and he may desire that, if he dies, his widow shall have the management of it during her life, and that the powers of the trustees shall really only come into operation on the deaths of both of them. In that event the form of our epitome must be varied, and the limitations after marriage will be, to the use of the husband for life, then to the use of the wife for life, and then, on the death of the survivor, to the use of the trustees in fee simple upon trust to sell, etc. Here we have legal tenants for life quite irrespective of section 63 of the Settled Land Act 1882, and the trustees will have no power whatever until both husband and wife are dead; but the husband will, during his life, have all the statutory powers of selling and leasing, and on his death his widow will have such powers. The trustees will only be able to sell after the death of both the husband and wife[2].

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[1] *Re Harding* (1891), 1 Ch., 60; 60 L. J., Ch., 277; 64 L. T., 539; *Re Bagot* (1894), 1 Ch., 177; 63 L. J., Ch., 515; 70 L. T., 220.

[2] For precedent in this shape, see 2 Prideaux, 380, where this form is recommended.

3. Strict settlement of freeholds.

In considering a strict settlement of freeholds, we must bear in mind that the primary design is to keep the settled estate intact, and to cause it, as far as possible, to descend strictly from father to son, so that there should always be, in connection with it, a recognized "head of the family." It is necessary, of course, to provide for the interests of persons other than the "head of the family" for the time being, and we have to notice, firstly, the strict uses of the settlement, and, secondly, the provisions outside the strict uses.

Strict uses.

In the first place, the estate is conveyed to the trustees in fee simple, to hold to the use of the settlor in fee simple until the marriage is solemnized, and there is, at the end of the settlement, a clause avoiding the settlement should the marriage not be solemnized within a year. Then, on the marriage taking place, come the strict uses, viz., to the use of the husband for life, and at his decease to the use of the first and other sons successively in tail male according to seniority, followed by a remainder to the use of the settlor in fee simple. Here we have the husband constituted the legal tenant for life, and for the time being the "head of the family," and as tenant for life having all the powers which are conferred by the Settled Land Act 1882[1]; and on his death we find the eldest son the "head of the family" and tenant in tail male in possession. Should he be dead leaving a son, that son occupies that position; if he is dead without a son, then the next son steps in, and so on throughout. Sometimes there is a limitation on failure of the tail male to the use of the sons successively in tail general, and then a remainder to the use of the daughters as tenants in common in tail, with cross remainders over

Cross remainders.

[1] Ante, pp. 167-186.

amongst them, *i.e.*, each taking a share, with a reciprocal contingency of succession over in the shares of the others; but these limitations do not form part of the strict uses of the settlement. So far, the only persons provided for with certainty are the husband and the eldest son, and if matters stopped here, there would simply be a tenant for life, and a remainderman in tail, who would be able to bar the entail at any time with the consent of his father, as protector, and by himself after his father's death. The object of having a definite "head of the family" and owner of the estate would be accomplished, but the other members of the family would be unprovided for. It is, however, necessary to provide for the wife, both during coverture and widowhood, and also for the other children.

Provision for wife's pin money.

As regards the wife, after the marriage the trustees are declared to hold to the use that the wife shall, during the joint lives of herself and her husband, receive a yearly rent-charge called pin money, and the husband only takes his life estate subject to this. Then, on the death of the husband, the trustees are declared to hold to the use that the widow shall, during her life, receive a yearly rent-charge called jointure, and the eldest son only takes subject to this. The lady is thus provided for, and there is no need to insert any express powers with regard to the enforcement of her rights, either to pin money or jointure, as they are provided for by section 44 of the Conveyancing Act 1881[1].

Jointure.

Provision for children other than eldest son.

The children, other than the eldest son, are provided for by means of portions, that is to say, it is provided that, out of the estate, shall be raised a certain sum of money for the benefit of all the

[1] Ante, p. 116.

younger sons and the daughters. Under such a provision, the general rule is that no child taking the estate under the strict uses, before the portions become payable, will be allowed to take any share in the sum provided for portions, and, consequently, if the eldest son dies without issue before the time when the portions become distributable, the second son becoming an eldest son, and entitled as such to the estate, is excluded from a share in the portion money; but if he once becomes entitled, by not at that time being the eldest son, to a share in the money allotted for portions, he does not lose that share by afterwards becoming entitled to the estate. It is advisable in the settlement to clearly express that this is what is intended[1]. It will, therefore, be seen that though on the death of the husband the eldest son succeeds to the estate, he may take it subject to serious burdens, viz., a heavy jointure for his mother, and a considerable sum to be provided for portions. Thus we have under this kind of settlement a "head of the family," and yet provision made for the other members of that family.

Term of years to secure portions.

It is, however, necessary to secure the portions for the other children, and the settlement limits the estate, on the husband's death and subject to the wife's jointure rent-charge, to the use of the trustees for a term of (say) 1000 years, upon trust by mortgage or sale thereof, should it be necessary, or out of the rents and profits, to raise and pay the portions, and the eldest son only takes his estate tail subject to this. This term is, therefore, held by the trustees *in terrorem* over the head of the eldest son, who knows that if he does not provide the amount of the portions the estate can, to any necessary extent, be taken away from him by the

[1] 2 Prideaux, 383.

trustees mortgaging or selling this term of years. Practically the estate is always worth more than what is necessary to provide the jointure and the portions, and, therefore, the eldest son keeps down his mother's jointure, and provides the portions for the other children, either out of his own private moneys, or by mortgaging the inheritance, or by some arrangement; and the object of the creation of the term of years being thus accomplished, it then becomes a satisfied term, and by the Satisfied Terms Act 1845[1] at once ceases. Before this Act the practice was to assign the term upon trust to attend the inheritance, when it remained a distinct thing, and, as such, passed from time to time to the owner of the inheritance, like a satellite following the principal body. There was some object in this before 1845, as a person who purchased the inheritance and also had a satisfied term assigned to him was, by the term, protected against any prior secret incumbrance on the property which had originated before the conveyance to him of the inheritance but subsequently to the creation of the term. Since 1845 there is no object whatever in assigning a satisfied term upon trust to attend the inheritance, and every term of years, upon becoming satisfied, at once ceases and determines.

Satisfied Terms Act 1845.

Provisions may be made in the settlement extending the range of investments prescribed by statute, in case the estate, or any part of it, is sold. Sometimes, also, the settlement contains a clause enabling the husband to charge the estate with a jointure in favour of any subsequent wife, and also contains provisions for children by a subsequent marriage. A clause should be inserted declaring that the statutory power of appointing new trustees shall be

Other provisions.

[1] 8 & 9 Vict., c. 112.

vested in the husband during his life[1]. There are, of course, many points in which elaboration of the settlement may be necessary according to the circumstances of the case, and the nature and extent of the estate settled: thus the powers conferred by the Settled Land Act 1882 may be added to[2].

How an estate is kept in a family.

It is evident that even by means of a strict settlement there is no certainty of keeping an estate in the family for any length of time, for, irrespective of the power of sale existing in the tenant for life under the Settled Land Act 1882, as soon as the eldest son attains 21 he may bar the entail with the consent of the father, and alienate the estate; and on the death of the father this can be done by the son alone—subject, of course to the pin money, jointure, and portions being provided for. How, then, is an estate kept in a family and handed down, as we frequently see is the case, from generation to generation? It certainly is not by force of the Statute De Donis, nor is it by force of one settlement alone, but it is by means of resettlements, executed from time to time, and it is necessary to understand the nature of a resettlement.

Resettlement.

The eldest son, the tenant in tail, comes of age; he is probably dependent on his father, and, beyond this, may be willing to accede to his father's wish that the estate shall be again tied up as far as the law permits. Accordingly he, together with his father, who is the protector of the settlement, executes a disentailing assurance, by means of which—though the father retains his life estate, the mother her pin money and jointure, and the younger children their portions—the son's estate tail in remainder is converted into a fee simple in remainder[3]. A deed

[1] For precedent of a strict settlement, see 2 Prideaux, 381.
[2] 2 K. & E., 696-711.
[3] 2 Prideaux, 488.

is simultaneously executed, whereby a yearly sum is secured to the son during his father's lifetime, and subject thereto the father resumes his old position of tenant for life, then, on his death, the son is made tenant for life, with provisions for the son's wife and younger children, and an estate tail to his sons in succession, and limitations over, and other provisions similar to those contained in the original settlement. In course of time the father dies, the son becomes tenant for life in possession, in his turn he has a son who attains 21, and the same process is repeated—a process which can continuously be repeated, generation after generation, and which, if done, will produce the desired result. It is only thus, by voluntary arrangement, that an estate can be kept in a family. Sometimes the son is not amenable to his father's desires, or the father dies too soon, and the son is improvident, and then we find, perhaps, a barring of the entail, and a sale of the property, and the original idea of keeping the estate in the family completely frustrated[1].

Settling personalty as if it were realty.

There remains one special kind of settlement to be noticed, and that is a settlement of personal chattels by way of strict settlement, as if they were real property. A settlor may possess, for example, a valuable gallery of pictures, and he may desire that they shall devolve on the person who, for the time being, is the "head of the family." We have seen that life interests may now exist in personal property, but we have also seen that there can be no estate tail in personal property, and that words which, applied to realty, would confer an estate tail, applied to personalty confer an absolute ownership[2]. Herein lies the difficulty, for if the pictures—or other personalty—are simply vested in the

Leventhorpe v. *Ashby*.

For a precedent of such a resettlement, see 2 Prideaux, 394; 2 K. & E., 743; see also hereon, Goodeve's Real Property, 94.

[2] See ante, pp. 10, 11, and *Leventhorpe* v. *Ashby* there quoted.

trustees upon trusts to correspond with the realty, although the husband will acquire only a life interest in them, directly a son is born they will vest absolutely in him. To accomplish the design of settling personalty to devolve exactly like realty in strict settlement, is, therefore, impossible, and the nearest approach to it is to vest the pictures—or other personalty—in the trustees upon trusts to correspond with the realty, postponing the period of vesting in any tenant in tail by purchase until he shall attain 21. It is necessary to only postpone the vesting in this limited way, for if it is postponed until the first tenant in tail attains 21, this will include a tenant in tail by descent, and the perpetuity rule[1] may, by possibility, be exceeded, which is impossible if the postponement is only until the first tenant in tail "by purchase" attains 21. A tenant for life of personal chattels settled in this manner, is said to be a tenant for life of heirlooms, and he cannot sell the personal chattels thus settled without the consent of the Court[2], and in the granting or withholding of such consent the Court has an absolute discretion, and is bound by no fixed rule, except that it must consider all the circumstances of each case as it arises[3]. Under a strict settlement of realty, comprising also personal chattels settled in the manner just indicated, it should be observed that before the eldest son can acquire a fee simple interest in the realty, he must bar the entail, but the personal chattels are absolutely his on attaining 21 without doing anything. If the eldest son dies before attaining 21, then the land passes to the second son as next tenant in tail (unless indeed the eldest son dies leaving a son, when it goes to such son), and the personalty also passes to him

Usual plan.

Settled Land Act 1882, sec. 37.

[1] Ante, pp. 104, 105.
[2] 45 & 46 Vict., c. 38, sec. 37.
[3] *Re Hope's Settled Estates* (1899), 2 Ch., 679; 68 L. J., Ch., 625; 81 L. T., 141; 47 W. R., 641.

because the eldest son died before he had acquired an absolute interest therein. This is the ordinary mode resorted to when it is desired that personal chattels shall, as far as possible, be held by the "head of the family" for the time being; but if all that is desired is that personal property, *e.g.*, leaseholds or any ordinary chattels, shall simply devolve and be treated as realty, another plan that can be adopted is to vest the same in the trustees, upon trust for sale and re-investment in the purchase of freeholds, to be held upon the strict uses, with power to postpone the date of actual conversion. The equitable doctrine of constructive conversion here brings about the desired result[1]. Another plan.

A marriage settlement not infrequently contains provisions, in default of issue of the marriage, for other members of the family, *e.g.*, brothers or sisters of the settlor; or it may provide, not only for the children of the marriage, but for the children of the husband, or wife, by a former marriage. Such persons are not strictly within the scope of the marriage consideration, and are generally volunteers, though taking under a settlement based upon value[2]. Provisions for persons outside the scope of the marriage consideration. Indermaur & Thwaites' Equity, 47, 48.

The power of the Court to vary ante-nuptial or post-nuptial settlements, after a final decree of nullity or dissolution of marriage, has been referred to at an earlier part of this work[3]. Varying settlements.

It is the practice for a marriage settlement to be prepared by the lady's solicitor, who is paid by the husband[4], although since 1882 he can also sue her. Costs.

[1] Goodeve's Real Property, 97.

[2] *Attorney General* v. *Jacobs-Smith* (1895), 2 Q. B., 341; 64 L. J., Q. B., 605; 72 L. T., 714. See further, Indermaur & Thwaites' Equity, 47, 48.

[3] Ante, p. 355.

[4] *Helps* v. *Clayton* (1865), 17 C. B., N. S., 553; 34 L. J., C. P., 1; *Re Lawrence* (1894), 1 Ch., at p. 559; 63 L. J., Ch., at p. 206.

CHAPTER XVI.

WILLS.

Scheme of this chapter.

In a previous part of this work, the history of the law as to making wills, both of realty and of personalty, has been noticed[1]. What we have now to particularly consider is, the present mode of making wills of property generally; the various points which must, necessarily, be considered by the practitioner in preparing a will; the results that may ensue under it; and some other incidental matters. We are not concerned with the steps to be taken after death to prove the will, as that is a matter belonging to the study of probate law and practice; nor are we concerned particularly with the points that may arise in the administration of a testator's estate after his death, as such matters appertain specially to a study of equity[2], though some of such matters must, necessarily, be touched on in considering results that may ensue under wills. What is specially desired here, however, is to deal with the subject in a conveyancing light; but, bearing in mind that a will does not come into operation until the testator's death, it follows that, in drawing a will the draftsman must have in view the practical position when death ensues.

Who can make a will.

Any person who is *sui juris* is competent to make a will. No infant can now make a valid will, except he is a soldier being in actual military service or a mariner or seaman being at sea, in which case, if he is 14, he can still make a valid noncupative

[1] Ante, pp. 186-189.
[2] Indermaur & Thwaites' Equity, Part II., Chap. III.

will of pure personalty[1]. A lunatic cannot make a valid will, except during a lucid interval[2]; but a person who merely suffers from delusions can make a valid will, if his delusions are not of such a nature as to affect his testamentary dispositions[3]. A person attainted for treason, or convicted of felony, though incapable of alienating by act *inter vivos*[4], can make a valid will. A married woman was formerly incapable of making a will of realty, unless it was settled upon her for her separate use[5]. She was also unable to make a will of personalty, unless (1) it was thus settled upon her, or (2) her husband gave her permission to do so, which licence he could revoke at pleasure, and even after her death before the will was proved. She could, however, exercise a power of appointment by her will, whether in respect of realty or personalty. The Married Women's Property Act 1882[6] enables a married woman to make a valid will of her own property to the fullest extent. But it was held that a will made under this Act could not pass property which she acquired after the coverture ended, unless it was re-executed[7]. This has, however, been altered by the Married Women's Property Act 1893[8] as regards the will of every married woman who dies

Married woman's will.

Married Women's Property Act 1893.

[1] 29 Car. II., c. 3, sec. 23; 1 Vict., c. 26, sec. 11; *Re Farquhar* (1846), 4 N. C., 651; *Re Hiscock* (1901), P., 78; 70 L. J., P., 22. This is subject, as regards inferior officers and ordinary seamen, to the Navy and Marines Wills Acts (28 & 29 Vict., c. 72; 60 & 61 Vict., c. 15), and an Order in Council of 28th December, 1865. Also a person aged 16 can, by signed writing, nominate a successor to his interest not exceeding £100 under the Industrial and Provident Societies Act 1893 (56 & 57 Vict., c. 39, secs. 25-27), or Friendly Societies Act 1896 (59 & 60 Vict., c. 25, secs. 56-58).

[2] *Re Walker* (1905), 1 Ch., 160; 74 L. J., Ch., 86.

[3] *Banks* v. *Goodfellow* (1870), L. R., 5 Q. B., 549; 39 L. J., Q. B., 237; *Boughton* v. *Knight* (1873), L. R., 3 P. & D., 64; 42 L. J., P., 41.

[4] Ante, pp. 264, 265.

[5] 34 & 35 Hy. VIII., c. 5, sec. 14; *Taylor* v. *Meads* (1865), 34 L. J., Ch., 203.

[6] 45 & 46 Vict., c. 75, secs. 1, 2, 5.

[7] *Re Price, Stafford* v. *Stafford* (1885), 28 Ch. D., 709; 54 L. J., Ch., 509; 52 L. T., 430.

[8] 56 & 57 Vict., c. 63, sec. 3.

after 5th December, 1893[1], so that such will passes (unless it shews a contrary intention) all property she owns at her death, whether acquired during the coverture or after its termination, without being re-executed after she becomes a widow.

When a will should be made according to English and when according to foreign law.

In making a will it is necessary to consider, as to land, the country where it is situated, and, as to other property, the place of domicil of the testator. The common law rule is that a will of land of any tenure must be made and interpreted according to the law of the country where the land is situate[2], but that a will of moveable estate must be made and interpreted according to the law of testator's domicil[3] at his death, for *mobilia sequuntur personam*. So if a person is possessed of land not in England the will must, as to that land, be made in accordance with the law of the place where the land is situate; subject only to this, that a British subject entitled to land in Scotland may, in England, make a will of it, either according to Scotch or English law[4]. If a person, though not domiciled in England, is entitled to land in England, a will dealing with it must be made in accordance with English law. Thus in *Pepin* v. *Bruyere*, a Frenchman domiciled in Paris owned a leasehold house in London and made a will of it in French form, and it was held that the will

Pepin v. *Bruyere*.

[1] *Re Wylie, Wylie* v. *Moffatt* (1895), 2 Ch., 116; 64 L. J., P., 613; 43 W. R., 475.

[2] *Freke* v. *Lord Carbery* (1873), L. R., 16 Eq., 461; *Duncan* v. *Lawson* (1889), 41 C. D., 394; 58 L. J., Ch., 502; 60 L. T., 732; *Pepin* v. *Bruyere* (1902), 1 Ch., 24; 71 L. J., Ch., 39; 85 L. T., 461.

[3] The Domicile Act 1861 (24 & 25 Vict., c. 121), sec. 121, provides that under a convention with any foreign state an Order in Council may direct that a British subject, resident in that state, shall not acquire a domicil there as to moveables either for testamentary purposes or intestate succession unless he has resided there one year and has lodged in a public office there a written declaration that he means to become domiciled there. It is believed this provision is at present inoperative.

[4] See 31 & 32 Vict., c. 102, secs. 19, 20; *Connell's Trustees* v. *Connell* (1872), 10 Court of Sessions Reports, 3rd Series, 627; 2 Prideaux, 552.

was void as it was not executed in accordance with the Wills Act 1837[1]. With regard to personal property (not land), where it is situated is a matter of no importance, for the rule is *mobilia sequuntur personam*, and the will must be made in accordance with the law of the testator's domicil. Thus a Spaniard, being temporarily in London, desires to make a will, his property consisting of land in England, and money invested in English consols. Two wills should be made, one in accordance with English law, so as to pass the land, and the other in accordance with Spanish law, so as to pass the consols.

Wills Act 1861.

This, however, is not quite the law as to wills of personal property made by *British* subjects, which are specially dealt with by the Wills Act 1861[2]. This Act provides that wills made within the United Kingdom by British subjects (whatever their domicil) shall, as regards personalty (including leaseholds[3]), be deemed well executed if made according to the laws in force in that part of the United Kingdom where the same are made[4]. And that wills made out of the United Kingdom by British subjects (whatever their domicil) shall, as regards personalty (including leaseholds[3]), be deemed to be well executed in the United Kingdom if made either according to (1) the law of the place where made, or (2) the law of the place where testator was domiciled when he made the will, or (3) the law then in force in that part of the British dominions where he had his domicil of origin[5]. Thus A is a British subject and was born in Canada, which was, therefore, his domicil of origin; he then quitted Canada and took up his permanent abode in Germany, which, therefore,

[1] (1902), 1 Ch., 24; 74 L. J., Ch., 39; 85 L. T., 461.
[2] 24 & 25 Vict., c. 114, sometimes quoted as Lord Kingsdowne's Act.
[3] Ibid., sec. 2.
[4] *Re Watson, Carlton* v. *Carlton* (1887), 35 W. R., 711.
[5] 24 & 25 Vict., c. 114, sec. 1.

became his domicil of choice; and he is now temporarily residing in France. His will is recognized as a valid will in England for the purpose of passing his personal estate (including leaseholds[1]) if made either according to Canadian law, German law, or French law.

Bloxam v. *Favre.*

The foregoing sections of the Wills Act 1861 only apply to British subjects. Thus, if an English lady marries a foreigner, *e.g.*, a German domiciled in Berlin, she becomes a statutory alien, and if her husband dies and she continues domiciled in Berlin and does not get a certificate of re-naturalisation as a British subject under the Naturalisation Act 1870, while she must make a will of English land in English form, her will of pure personalty in England is not valid unless it is made by the law of her domicil, *i.e.*, Berlin[2].

Change of domicil.

The Wills Act 1861 further enacts[3] that no will of personal property, whether made by a British subject or a foreigner[4], once validly made is to be revoked or deemed invalid, or have its construction altered, because the testator's domicil is changed after the will is made. So that where a Dutch lady made a will of pure personalty in Dutch form, and then married a domiciled Dutchman (which by Dutch law did not revoke her will), and they afterwards acquired an English domicil, it was held upon her death many years afterwards that her will was valid in English courts[4].

Re Groos.

Execution of will.

English law[5] requires a will to be in writing, signed at the foot or end thereof by the testator,

[1] *Re Watson, Carlton* v. *Carlton* (1887), 35 W. R., 711.
[2] *Bloxam* v. *Favre* (1884), 9 P. D., 130; 53 L. J., P., 26; 50 L. T., 766.
[3] 24 & 25 Vict., c. 114, sec. 3.
[4] *Re Groos* (1904), P., 269; 73 L. J., P., 82.
[5] 1 Vict., c. 26 (Wills Act 1837), sec. 9.

or by some other person in his presence, and by his direction; and it must be so signed, or the signature acknowledged, by the testator in the presence[1] of two or more witnesses, both present at the time of the signing or acknowledgment; and each witness must subscribe the will in the presence of the testator, or in such a position that the testator could, if he chose, see them. It is not necessary to have a formal attestation clause, but it is usual, such clause being as follows: "Signed by the above-named A B as his last will, in the presence of us, both being present at the same time, who, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." If there is no proper attestation clause, an affidavit of due execution will be required after the testator's death, when the will is carried in for probate. Although the clause expresses that the witnesses have signed in the presence of each other, this is not necessary. The signature has to be at the foot or end, a matter fully explained by the Wills Act 1852[2], which renders a signature good, although not strictly in the most proper place, provided, in any reasonable sense, it can be said to be at the end of the will.

Wills Act 1852.

Any person competent to give evidence is a good attesting witness to a will; but it is advisable to select persons of manifest understanding, and of probable credibility. Formerly, if a person attesting a will was interested thereunder, as a devisee or legatee, the attestation was bad; but now it is good, such person, however, losing any beneficial interest conferred on him by the will[3], even if there are two

Who may attest.

[1] A document professing to be a will, but not executed in accordance with the Wills Act, can operate as an exercise of a power to appoint by any writing in the nature of or purporting to be a will (*Re Broad, Smith* v. *Draeger* (1901), 2 Ch., 86; 70 L. J., Ch., 601; 84 L. T., 577; and see ante, p. 340).

[2] 15 & 16 Vict., c. 24.

[3] 1 Vict., c. 26, sec. 15.

witnesses besides himself[1]. An extreme instance of this occurred in *Re Pooley*[2], where a solicitor was appointed executor, with power to make professional charges for work done as executor, and he attested the will, and it was held that, in consequence, he lost his right to charge any profit costs. If a beneficiary attests a will, but subsequently a codicil is executed, which is attested by other witnesses, and the codicil confirms the will, the gift is thus rendered valid[3]; and even should the beneficiary afterwards attest another codicil, this will not affect his right to the benefit given him, as there is one instrument which he has not attested[4]. So, also, a beneficiary under a will which he has not attested does not lose the benefit by subsequently attesting a codicil[5]. If property is given to several persons as joint tenants, and one attests the will, he is considered as if dead, and the others take the whole property[6]. This would not be so were they tenants in common, as then the share of the attesting witness would fall into the residue, or, if no residuary clause, would go to the heir-at-law, or next-of-kin, according to the nature of the property; but if a gift is to a class (*e.g.*, my nephews) as opposed to a gift to individuals, and one of the class attests the will, then the other members of the class take the whole gift[6]. There is no objection to a creditor of the testator being an attesting witness, even though the will contains a charge on the property of the testator for payment of debts, and

Re Pooley.

Trotter v. *Trotter.*

[1] *Randfield* v. *Randfield* (1860), 8 H. L., 225; 11 W. R., 847. See, however, *Re Sharman* (1869), 1 P. & D., 161; 38 L. J., P., 47.

[2] (1889), 40 Ch. D., 1; 58 L. J., Ch., 1; 60 L. T., 73; 37 W. R., 17. It has also been held that a solicitor executor, who has power conferred on him to charge profit costs, cannot charge them if the estate is insolvent; for in respect of his right to make profit charges he is a beneficiary, and, until all debts have been paid, a beneficiary can receive nothing (*Re White, Pennell* v. *Franklin* (1898), 1 Ch., 297; 67 L. J., Ch., 139; 77 L. T., 793).

[3] *Anderson* v. *Anderson* (1872), L. R., 13 Eq., 381; 41 L. J., Ch., 247.

[4] *Trotter* v. *Trotter* (1899), 1 Ch., 764; 68 L. J., Ch., 363; 80 L. T., 647; 47 W. R., 477.

[5] *Marcus* v. *Marcus* (1888), 57 L. T., 399.

[6] *Re Coleman* (1877), 4 Ch. D., 165; 46 L. J., Ch., 33.

the executor appointed by the will is also a good attesting witness[1], as also is a person to whom the will gives property upon certain trusts[2]. Not only is a beneficial gift to an attesting witness void, but also one to the husband or wife of an attesting witness. It has, however, been held that the subsequent marriage of an attesting witness to a beneficiary does not avoid the gift[3].

Gift to husband or wife of attesting witness.

Wills of personalty might always operate to pass property acquired by the testator after the making of the will, but it was otherwise as regards wills of realty which only spoke from the date of the making. There is now no such distinction, and every will is now[4] construed as if it had been executed immediately before the testator's death, unless a contrary intention appears; so that if a will contains a proper residuary clause, property comprised in lapsed[5] or void devises passes under it to the residuary devisee, as does, and always did, property comprised in lapsed or void bequests, pass to the residuary legatee. A general, though not a special, power of appointment, may be exercised by a general or residuary gift[6]; and, therefore, although a general power may not have been conferred on the testator until after he made his will, such a gift in that will passes the property comprised in the power[7]. It is always advisable to insert a residuary clause in a will, for otherwise any undisposed of realty goes to testator's heir-at-law. As to personalty, if the will appointed an executor and contained no residuary bequest, the executor formerly

Date from which will speaks.

Airey v. *Bower*.

[1] 1 Vict., c. 26, secs. 16, 17.
[2] *Cresswell* v. *Cresswell* (1868), L. R., 6 Eq., 69.
[3] *Thorpe* v. *Bestwick* (1881), 6 Q. B. D., 311; 50 L. J., Q. B., 320; 44 L. T., 180.
[4] 1 Vict., c. 26, sec. 24.
[5] *Mason* v. *Ogden* (1903), A. C., 1; 72 L. J., Ch., 152; 87 L. T., 622, in which it was held that a lapsed specific devise passed under a devise of "all other my freeholds."
[6] 1 Vict., c. 26, sec. 27. See post, p. 550.
[7] *Airey* v. *Bower* (1887), 12 A. C., 263; 56 L. J., Ch., 742; 56 L. T., 409.

took it beneficially, on the principle of an implied gift in his favour; but now by the Executors Act 1830[1] he is an implied trustee for the testator's next-of-kin, though if the testator has no next-of-kin the executor still takes the personalty for his own benefit[2] unless a contrary intention appears[3].

1 Wm. IV., c. 40.

Change of interest after making will.

In considering the date from which a will speaks, it is necessary also to notice the position where a change in the character of property specifically given by the will takes place between the making of the will and the death of the testator. Thus, suppose a testator bequeaths a leasehold house, and then surrenders his lease and takes a new lease, or buys up the reversion, thus causing a merger. Here, formerly, the legatee would get nothing, because, though the actual thing was still existing, there had been a technical change[4]. The Wills Act 1837, however, provides[5] that no conveyance or other act done in connection with property given by a will shall prevent the operation of the will with respect to such estate or interest in the property as the testator shall have power to dispose of by will at the time of his death. The effect of this provision is merely to repeal the old law, under which a change of interest in the same property of itself revoked the gift, and to leave the Court free to carry out the testator's intention, and not necessarily to make something newly acquired pass under the gift, if the language of the will is not appropriate to pass it. Thus, in one case, a testator gave the lease of the house in which he should be living at the time of his death to his wife. At the date of his will he was living in a house which he held under a lease at a rack-rent, and he afterwards

1 Vict., c. 26, sec. 23.

Knight v. *Burgess.*

[1] 1 Wm. IV., c. 40.
[2] *Re Bacon, Camp* v. *Coe* (1886), 31 Ch. D., 460; 55 L. J., Ch., 368; 54 L. T., 150.
[3] *Attorney General* v. *Jefferys* (1908), A. C., 411; 77 L. J., Ch., 685.
[4] As an illustration, see *Jacob* v. *Jacob* (1900), 82 L. T., 270.
[5] 1 Vict., c. 26, sec. 23.

bought and went to reside in a freehold house, where he died. It was held that the widow did not take this house[1]. On the other hand, where a testator having a leasehold house, gives his house for all his interest therein, or for all the residue of his term therein, and afterwards acquires the reversion, the fee simple has, in several cases, been held to pass, which certainly would not have been the case prior to the Wills Act 1837. The principle of these cases is, that the testator's intention was that the beneficiary should have his interest, whatever it might be, and that he intended to describe the property, and not merely limit the gift to the estate he had in it at the time of his death[2].

Property capable of passing by will.

All property capable of alienation without any special and peculiar formalities can, as a general rule, be disposed of by will, provided the testator's interest therein did not terminate with his death. Copyholds may be thus disposed of, without any previous surrender to the lord, which was once necessary[3]. A person possessed of property, as a sole trustee or mortgagee, could formerly devise the legal estate in such property by his will; but he cannot do so now as regards freehold property, as it always passes to his personal representatives[4], though he may still do so as regards copyhold property[5]. Property which is capable of being disposed of by will, may be given either specifically, or by way of a general or residuary clause, and, therefore, copyhold property held by the testator as a sole mortgagee or trustee will pass under such a clause, unless a contrary intention can be gathered from the

Trust and mortgage property.

[1] *Re Knight, Knight* v. *Burgess* (1887), 34 Ch. D., 518; 56 L. J. Ch., 770; 56 L. T., 630.

[2] Theobald on Wills, 131, 132; *Re Evans* (1909), 1 Ch., 784.

[3] 1 Vict., c. 26, sec. 3. A previous surrender had long previously ceased to be necessary (55 Geo. III., c. 192).

[4] 44 & 45 Vict., c. 41, sec. 30.

[5] 57 & 58 Vict., c. 46 (Copyhold Act 1894), sec. 88.

General devise.

will[1]. Before 1838 a general, or residuary, devise did not, as a rule, pass lands over which the testator had a general power of appointment; nor did it pass leaseholds unless, indeed, the testator only possessed leaseholds, when, on the principle of the testator's evident intention, the leaseholds were allowed to pass. The Wills Act 1837[2], however, now provides that a devise of testator's land or any other general devise which would describe copyholds or leaseholds if the testator had no freeholds, shall include both copyholds and leaseholds as well as freeholds; and that a general devise of real estate (or a general bequest of personal estate) shall also operate as an execution of a general power of appointment over real (or personal) estate, as the case may be, unless the will shews a contrary intention. The Wills Act 1837 contains nothing about the exercise of a special power by will; but the Courts have laid down that in order to exercise a special power by will, the will must (1) refer to the power, or (2) refer to the property subject to the power, or (3) in some other way express an intention to exercise the power[3]. Whether there is, or is not, such an intention is, in the absence of express words, a question of construction upon the whole will[3]. As a general rule, if the testator expresses that he makes his will in exercise of all powers vested in him, that sufficiently shews his intention[3]. Although under a general or residuary devise of "land," freeholds, copyholds, and leaseholds do now pass, if a testator makes a general, or residuary, devise of all his "real estate," leaseholds do not generally pass[4], as they are not included in the

Butler v. *Butler*.

[1] *Lord Braybrooke* v. *Inskip* (1803), Tudor's Conveyancing Cases, 322.

[2] 1 Vict., c. 26, secs. 26, 27.

[3] Per Buckley, L.J., in *Re Weston, Neaves* v. *Weston* (1906), 2 Ch., 620; 76 L. J., Ch., 54; *Wrigley* v. *Lowndes* (1908), P., 348; 77 L. J., P., 148.

[4] *Butler* v. *Butler* (1885), 28 Ch. D., 66; 54 L. J., Ch., 197; 52 L. T., 90.

expression "real estate" as defined in the Wills Act 1837[1]. If, however, it appears that he meant also to pass the leaseholds, then they may even pass under such words, *e.g.*, where a testator devised his real estate situate at A and B, and the property at B was leasehold, it was held that having mentioned the localities, and having no freeholds at B, his leaseholds there would pass[2]. No very definite rule can, therefore, be laid down, as it mainly turns on the intention of the testator.

Moase v. *White.*

In fact the main rule to be observed in the construction of wills is, that the intention of the testator shall be regarded rather than the strict words used. Certainly a draftsman should not, because of this rule, draw a will carelessly, and omit to use technical and proper words which would be essential in the case of a deed. Generally the same words and rules should be used as in a deed, but, in many cases, wills are in fact drawn carelessly, especially because they are so frequently drawn by testators themselves or by persons other than lawyers. The rule of following the intention is, therefore, one of great importance; and the Wills Act 1837 contains various provisions, the object of which is to give effect to a probable intention. Thus we have seen that, in a deed, to pass a fee simple, the property must be conveyed to the grantee "and his heirs" or "in fee simple," but the Wills Act provides[3] that a devise without any words of limitation shall pass the fee simple, or other the whole estate which the testator had power to dispose of. This provision only applies to beneficial devises, but the Act also deals with devises to trustees. When there is a devise to trustees, it is necessary to consider whether they take any, and if

Intention of testator to be observed.

Words sufficient to pass fee simple.

Estate of trustees.

[1] 1 Vict., c. 26, sec. 1.
[2] *Moase* v. *White* (1876), 3 Ch. D., 763.
[3] 1 Vict., c. 26, sec. 28.

so, what legal estate. The rule is that the trustees get the legal estate, if the devise is to the use of the trustees, or if the devise is simply to the trustees but with active duties. Where trustees do thus get the legal estate, and it is not expressed how much they are to take, the Wills Act 1837 provides[1], in effect, that where real estate is devised to trustees without any words of limitation, they shall always take a freehold estate, and if the beneficial interest is not given to any person for life, or, if it is given to a person for life but the trust may continue beyond the life of such person, then they shall take the fee simple[2]. The rule on this point before the Act was, that the trustees took just such an estate as was necessary for the purposes of their trust, a rule which gave rise to great difficulty and to many conflicting decisions, and in which there was no element of certainty. The present provision appears satisfactory, and its effect may be illustrated thus: Suppose Whiteacre is devised "to trustees" without words of limitation, or any words expressing what estate they are to take, in trust to receive the rents, and pay them to X for life, with remainder to Y, here the active duty cannot last beyond the life of X, and, therefore, the trustees have only got the legal estate for the life of X, and the legal fee vests in Y. But, suppose the devise is on trust to receive and accumulate the rents for 10 years for a certain purpose, and then in trust for Y, here the trustees will take the legal fee, for the beneficial interest is not given to any person for life[3]. Or, again, suppose the devise is on trust to receive the rents and pay them to X for life, and then, if a certain event happens, to receive and accumulate the rents for five years for a certain purpose, and then to Y, here also

Illustrations.

[1] 1 Vict., c. 26, secs. 30, 31.
[2] 2 Jarman, 1166.
[3] 2 Prideaux, 565.

the trustees will take the legal fee, because, though the beneficial interest is given to X for life, yet the purposes of the trust may continue beyond the life of X. It is sometimes very important to consider what estate the will has vested in the trustees, because if the legal fee is in them, they must, by conveyance, ultimately vest it in the person becoming absolutely entitled. Thus, in both the second and third examples given, Y would require the trustees, when the time arrives, to convey the legal fee to him, or as he may direct, whilst in the first example nothing of the kind is necessary, but the legal fee is in Y on the death of X. On a death since 1897, the legal estate (except in copyholds to which the deceased has been admitted tenant on the court rolls) must vest in the personal representative to start with, but when the estate is wound up he must convey to the trustees or assent to the devise under Part I. of the Land Transfer Act 1897.

Words sufficient to create an estate tail.

Again, we have seen that, in a deed, an estate tail can only be created by using the technical words of limitation "heirs of the body" or "in fee tail." On this point the Wills Act 1837 contains no express enactment, but the rule is that any words in a will shewing an intention to create an estate tail suffice. Thus an estate tail will be created by a devise to a person and his "issue" or "descendants" or "seed," and, in fact, by any words of procreation[1]. And a devise to a person "and his heirs male" will create an estate in tail male, although in a deed the word "male" would be rejected and the grantee would have a fee simple estate[2]. There is, however, in the Wills Act 1837, one provision on the

[1] As to the rule in *Wild's Case*, see ante, p. 22.

[2] Theobald on Wills, 342. See also *Pelham Clinton* v. *Newcastle* (1903), A. C., 111; 72 L. J., Ch., 424; 88 L. T., 273.

"Die without issue."

subject of the creation of an estate tail. In a will made before 1838, if land were devised to A and if A should "die without issue" to B, this was held to give A an estate tail. The argument was this: The devise was taken to mean that on failure of A's issue, at any period, B was to take; and this exactly resembling what would have been the position had the land been limited to A and the heirs of his body with remainder to B, A took an estate tail by implication. Nominally, this gave B a continual chance of taking the land, by reason of the possible failure of A's issue at some future period; but, as estates tail could be barred, practically B's chance of ever getting the property was indeed remote.

1 Vict., c. 26, sec. 29.

The Wills Act provides[1] that in a will made since 1837 the words "die without issue," or any words importing an indefinite failure of issue, shall mean a failure of issue in the lifetime or at the death of the devisee, and not an indefinite failure of issue, unless a contrary intention appears. So now, on a devise to A, but if A dies without issue to B, the fee simple vests in A subject to an executory devise over in favour of B, if, when A dies, he leaves no issue; but, if A leaves issue, then B has no further chance of taking the property, for A's estate becomes absolute. This places B in a somewhat better position than formerly, as it does give him one definite chance, and as the law stood until 1883, it is evident A could never become absolute owner during his life, for there was always the possibility that he might die leaving no issue. But the Conveyancing Act 1882 now provides[2] that if such a devise is contained in the will of a testator who dies after 1882, the executory limitation over to B shall become void and A is absolute owner as soon as any child of A attains the age of 21.

Conveyancing Act 1882, sec. 10.

[1] 1 Vict., c. 26, sec. 29.
[2] 45 & 46 Vict., c. 39, sec. 10.

Personalty.

If a will made before 1838 bequeathed personalty to A, but if A die without issue to B, the effect was to make A the absolute owner. But if the same gift is in a will made since 1837, the personalty now goes to B if A has no issue alive at his own death. And the Conveyancing Act 1882 does not in any way alter this.

General meanings of some particular gifts.

The rule that in wills the intention of the testator shall be observed, and the fact that testators often draw their own wills, account for the use of many vague and ambiguous expressions which it is difficult to construe. A gift of "money" or "ready money" will pass not only actual cash in the house, but money at call at a bank, or in the hands of an agent, but it will not pass money on deposit at a bank withdrawable on 14 days' notice[1], or money due on notes of hand, or other debts. A gift of "money" may, however, from the context, sometimes be construed in a more comprehensive sense, so as even to pass the whole personal estate. A gift of "book debts" appears to mean the amount due to the testator after deducting debts due from him. A gift of "furniture" *primâ facie* includes, not only such furniture as is used for domestic and personal purposes, but also plate and pictures, and probably ornaments, but not wines or books. A gift of "securities[2] for money" will pass anything that can properly be called a security, and the full benefit thereof, *e.g.*, a mortgage debt, a lien for unpaid purchase money, consols, an amount owing on a bill or note, and debenture stock, but not money at a bank, bank stock, money due upon an I O U, or any mere debts. Under a bequest of "chattels in my house," generally, everything that can properly come under the description of a chattel will pass, *e.g.*, even

[1] *Re Wheeler* (1904), 73 L. J., Ch., 576.
[2] *Re Johnson, Greenwood* v. *Robinson* (1903), 89 L. T., 520; *Re Craven* (1908), 99 L. T., 390.

money, or bank notes; but such a bequest will not pass choses in action, such as bonds or securities for money in the house, which are not considered as chattels in the house, but evidences of title to property elsewhere[1]. The decisions on the meaning of particular expressions are very numerous, and must all be taken subject to any qualification that may be found from the context and the general language used in the will[2].

Appointment of executor.

Every will should appoint an executor, for otherwise it will be necessary, after death, to apply for a grant of letters of administration *cum testamento annexo*.

Powers of executor.

The executor formerly had, as a rule, nothing whatever to do with his testator's freeholds or copyholds, as it was only the personalty which vested in him. Devisees took directly from the testator, whilst legatees took through the channel of the executor, who first had the personalty in his hands for administration. The only case in which the executor had anything to do with his testator's freeholds or copyholds—unless they were devised to him—was where they were charged with payment of debts, and the will made no express provision as to who was to sell for the purpose of raising the necessary money. In such a case, and provided the testator had not devised the property to trustees for the whole of his estate or interest therein, the executor had by statute[3] a power of sale for the purpose of raising the money to pay testator's debts. The position is, however, very different if the testator dies on or after 1st January, 1898, owing to Part I. of the Land Transfer Act 1897[4], which enacts that

22 & 23 Vict., c. 35, sec. 16.

[1] Theobald on Wills, 159-165; Williams on Executors, 927-946.

[2] *Re Johnson, Greenwood* v. *Robinson* (1903), 89 L. T., 520; *Re Craven* (1908), 99 L. T., 390.

[3] 22 & 23 Vict., c. 35, sec. 16. This provision did not apply to an administrator *cum testamento annexo* (*Re Clay & Tetley* (1881), 16 Ch. D., 3; 43 L. T., 403).

[4] 60 & 61 Vict., c. 65, secs. 1-3.

where real estate (other than copyholds) is vested in any person, without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve on and vest in his personal representatives, as if it were a chattel real, and shall be administered by the personal representatives as if it were personalty. But if there are several executors[1], all must join to make a conveyance of real estate to a purchaser, whether they have proved the will or not, except those who have renounced probate, or else an order of court must be obtained. Subject to administration, the personal representatives are to hold the real estate as trustees for the persons beneficially entitled thereto. Now, therefore, on a testator's death his whole property (except copyholds, which still pass directly to the devisee) vests in the executor. As to personalty, the executor takes possession of that, and in due course, having paid the duties and debts, pays the legacies, and hands over the balance to the residuary legatee, and as to property specifically bequeathed, he assents to the legacies, and allows the legatee to take possession of the subject matter. As to the realty, in similar manner, if it is not required for payment of the debts, the executor assents to the devise or conveys to the devisee, and if he does not do this within a year the Court, if satisfied that he does not require the property for the purposes of the deceased's estate, may order him to duly vest it in the devisee[2]. The position is substantially the same on an intestacy; the realty (other than copyholds) vests in the administrator, who must ultimately, if it is not required by him, convey it to the heir. In the case of an intestacy, there must be a conveyance

Land Transfer Act 1897, Part I.

[1] *Re Pawley & London and Provincial Bank* (1900), 1 Ch., 58; 69 L. J., Ch., 6; 81 L. T., 507; *Re Cohen* (1902), 1 Ch., 187; 71 L. J., Ch., 164; 86 L. T., 73.

[2] 60 & 61 Vict., c. 65, sec. 3. See hereon *Re Cary & Lott* (1901), 2 Ch., 463; 70 L. J., Ch., 653; 84 L. T., 839.

from the administrator, but in the case of a testacy an assent will equally serve the purpose. The Act does not, either on a testacy or an intestacy, alter the ultimate devolution of the property, but simply, for convenience, vests it all in the personal representative; neither does the Act alter the order in which assets are applied in administering the estate[1].

Influence of the Land Transfer Act 1897 on the selection of an executor.

The fact that freehold property now necessarily vests in the executors in the first instance should be borne in mind in framing a will, and, by reason of the Act, it may be advisable to appoint a person executor whom the testator would not, but for it, have appointed. Suppose a testator devises his realty to A, and appoints X his executor; notwithstanding the devise, the realty vests in X, and some time may have to elapse before he can decide whether the realty is required for payment of debts. X may enter into possession of the realty, collect the rents, and generally do all necessary acts in respect of it. A may be a widow or child of the testator, and it may have been the testator's desire that A should immediately occupy the property, but if X insists on his rights, A must remain out of possession for the present. Having reference, therefore, to the possible difficulties that may occur where a testator is proposing to devise the bulk of his realty to one person for his own benefit, it would appear well to appoint that person also executor, or one of the executors.

Testator's debts.

In making a will the first thought of a testator should be as to the payment of his debts after his death, but this is not a point which need usually directly trouble the draftsman, bearing in mind that real as well as personal estate is now liable for the payment of debts[2], and that both realty and

[1] 60 & 61 Vict., c. 65, sec. 2 (3).
[2] Ante, pp. 206, 207.

personalty now vest in the executor. There is no occasion, therefore, to insert any clause charging real estate with payment of debts, but if such a clause is inserted, or if the will directs the testator's debts to be paid (which usually constitutes a charge of such debts on the real estate), then it may be noticed that on the testator's death the realty constitutes equitable, and not legal assets, a point which is not, however, of much practical importance at the present time[1]. Bearing in mind that on the death of the testator his copyhold property does not devolve upon the executor, it will be advisable, if it is thought that it may be required for payment of the testator's debts, to insert a clause directing or empowering the executors to sell it. The copyholds should not be devised to the executors upon trust to sell, for then the executors would require to be admitted, which would cause unnecessary expense. If the will does contain a devise or trust for payment of debts, this will not include debts barred by the Statutes of Limitation prior to the death of the testator, nor will it prevent the Statutes of Limitation from running after the testator's death[2]. If, however, real estate is included in such a trust, then it must be borne in mind that, there being a charge on the lands thereby expressly created, the statutory period will be twelve years, and not six years as in the case of an ordinary debt; and, therefore, although after six years the debt cannot be enforced against the personal estate, it can be enforced against the real estate within twelve years[3].

Indermaur & Thwaites' Equity, 141, 142.

Copyholds.

Warburton v. *Stephens.*

In carrying out a testator's desires with regard to his property, a variety of points in connection with devises of realty, and bequests of personalty, present

Devises and Legacies.

[1] See hereon Indermaur & Thwaites' Equity, 141, 142.
[2] 2 Prideaux, 609.
[3] *Re Stephens, Warburton* v. *Stephens* (1890), 43 Ch. D., 39; 59 L. J., Ch., 109; 61 L. T., 609.

themselves. If a testator desires to give all his property to one person, it is carried out by one general clause, but he may desire to give specific estates, and specific things, to different individuals, and legacies of various amounts. We have, then, specific devises, and all kinds of legacies to deal with, and a consideration of the subject of legacies generally is particularly necessary.

Different kinds of legacies.

Legacies may be general, specific, or demonstrative. A general legacy is one given out of the testator's estate generally, and not comprising any specific portion of it, *e.g.*, "I give £100 to A." A specific legacy is a gift of some special portion of the testator's estate, *e.g.*, "I give my diamond ring to A." A demonstrative legacy is a gift of a general nature, but payable, primarily, out of some special portion of the testator's estate, *e.g.*, "I give £100 to A, payable out of my £500 Consols." As regards any specific devise or legacy (subject to what has been stated[1] as regards a change in the property of the testator), if the thing given does not belong to testator at the date of his death, the gift will fail,

Ademption.

and this is styled ademption, a point which cannot occur as regards a general legacy, for that, if there are sufficient assets, must always be paid, and if the assets are not sufficient, must abate proportionately. A specific legacy, therefore, if the subject-matter is existent at the time of the testator's death, has priority over a general legacy, and is not subject to abatement, but it is liable to ademption. If a person, after having by his will specifically bequeathed a certain personal chattel, pledges or mortgages it, there is no ademption, but the legatee is entitled to have the specific thing freed from the charge, which must be paid out of the testator's general personal

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[1] Ante, pp. 548, 549.

estate[1]. If, however, it is a devise of freehold or copyhold property, or a bequest of leasehold property, then it is otherwise, and though the devisee or legatee gets the property given to him, he takes it subject to the charge existing thereon[2].

Vested and contingent legacies.

Legacies which are given directly to a particular person are always vested, that is, if the legatee is living when the testator dies, he acquires an immediate interest therein, and though he may die before he actually receives the amount of the legacy, yet it goes as part of the legatee's estate under his will, or to his next-of-kin, subject to any disposition he may have made of it before he died. If, however, a legacy is given to a particular legatee, but is not to be received by him until some future period, then the draftsman of the will should consider whether it is intended to make the legacy vested or contingent, bearing in mind that a vested legacy is one which will be paid in all events, even though the time of payment is postponed, whilst a contingent legacy is one which will not be paid unless a certain contingency happens.

Rule to determine whether legacy vested or contingent.

But although it is easy to lay down a general rule as to when a legacy is to be deemed vested or contingent, it is not always so easy to apply it. However, as regards a legacy of pure personalty, if the legacy is bequeathed "payable" or "to be paid" at a certain future time, *e.g.*, when the legatee attains 21, it is a vested legacy, for here only the time of actual payment is postponed, so that it will pass to the legatee, although he dies before the arrival of that time, and is, if he is *sui juris*, capable of disposition by him, and, if not disposed of, will pass to his

[1] *Bothamley* v. *Sherson* (1875), L. R., 20 Eq., 304; 44 L. J., Ch., 589.

[2] Ante, p. 503.

next-of-kin. But where a legacy is bequeathed to a person "at" or "if" or "when" a future event happens, this is on a contingency, and if the legatee dies before the event happens, the legacy fails, and does not go to his personal representatives and is not subject to his disposition, unless, indeed, interest is given in the meantime, when it is otherwise, because the gift of interest seems to shew that the actual ownership was intended to be given, and that it was merely the time of enjoyment that was postponed[1]. The above remarks must, however, be confined to purely personal legacies. Legacies are primarily payable out of the testator's personal estate only, and, therefore, in drawing a will it is necessary to consider whether the legacies shall be charged on the testator's real estate. If this is done, then as regards the question whether or not the legacy will be paid if the legatee dies before the future day, it must be borne in mind that there is an important difference between purely personal legacies and legacies charged on land. This difference is accounted for by the fact that, in deciding on the validity of purely personal legacies, the Court, in general, follows the rules of the Civil Law as they were recognized and acted on in the Ecclesiastical Courts, which had jurisdiction over such matters; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the Common Law[2]. As regards legacies charged on, and to be paid only out of land, therefore, and made payable *in futuro*, the rule is, that if the postponement is with reference to some event personal to the legatee, then if that event never

Legacies charged on land.

[1] *Stapleton* v. *Cheales* (1711), Tudor's Conveyancing Cases, 438; *Hanson* v. *Graham* (1801), Ibid., 440; *Re Jobson, Jobson* v. *Richardson* (1890), 44 Ch. D., 154; 59 L. J., Ch., 245; 62 L. T., 148; *Re Gossling* (1903), 1 Ch., 448; 72 L. J., Ch., 433; 88 L. T., 279.

[2] Tudor's Conveyancing Cases, 467, 468.

happens, the legacy is not to be raised out of the land. Thus, take two cases of legacies charged upon land, and both payable *in futuro*: (1) Legacy to be raised and paid to A out of Whiteacre on A's attaining 21; (2) Legacy to A to be raised and paid out of Whiteacre on the death of B, to whom Whiteacre is devised for life. The payment of the legacy is postponed, in the first case, from a circumstance personal to the legatee, and if he dies before 21 it will not be raised and paid, but will sink into the land for the benefit of the person entitled to the land; but, in the second case, the postponement has regard to the circumstances of the estate, and it is considered that the testator meant it to be raised and paid, at all events, on the death of the tenant for life, although A might then be dead. Where legacies are charged on a mixed fund of realty and personalty, in the absence of intention to the contrary, the personal estate is considered as the primary fund, and the realty as the auxiliary means for their payment; and, so far as the personal estate will extend to pay such legacies, the case, as to vesting, is governed by the same rules as if the legacies were payable out of personal estate only, but, so far as the real estate must be resorted to for their payment, the case is governed by the same rules as if they were charged on the real estate only[1].

Legacies payable out of personalty and realty.

As regards a legacy to a charity, it was formerly very important not only to take care not to charge it on, or direct it to be paid out of, land, or the proceeds thereof, but also specially to direct it to be paid out of pure personalty. The reason for this was that, under the former Mortmain Acts, a charity could not take real property or impure personalty under a will. But now the Mortmain Act 1891 permits land to be given by will to a charity, subject to the rule

Charitable legacies.

[1] Tudor's Conveyancing Cases, 468, 469.

that it must, ordinarily, be sold within a year from the testator's death. Consequently, it is no longer necessary to insert in a will any special clause directing charitable legacies to be paid out of pure personalty, and such legacies may even be given to be paid out of the proceeds of land, or may be charged upon land[1].

Rule in *Shelley's Case* applied to legacies.

In drawing a will, the rule in *Shelley's Case*, previously referred to[2], must be borne in mind. By analogy to it, it is held that a bequest to a person and his executors, or to a person for life and then to his executors, gives the legatee the absolute interest. If, however, the gift is to the legatee for life, and then to his executors or administrators for their own use and benefit, it will be different, for the legatee will only take a life interest, and his executors or administrators will take beneficially; but the intention that the executors or administrators are to take beneficially must be clearly shewn. A legacy to a person for life, with a power to appoint the corpus by deed or will, or by will only, and to his executors or administrators in default of appointment, gives the legatee an absolute interest, and entitles him to immediate payment[3].

Lapse.

The possible lapse of a devise or bequest should be borne in mind in drawing a will. Lapse is the failure of a devise or bequest because the devisee, or legatee, dies before the testator. If the devisee or legatee dies in the testator's lifetime, the gift altogether fails, and this rule applies even in the case of a gift to a debtor of his debt, though the debt be given to him, his executors, administrators, and assigns, with a direction to hand over the

Elliott v. *Davenport.*

[1] See hereon, ante, p. 193.
[2] Ante, p. 85.
[3] Williams on Executors, 889-900; Theobald on Wills, 390; *Re Davenport* (1895), 64 L. J., Ch., 252.

security for the debt[1]. In the event of a lapse, if the property is realty, it goes to the residuary devisee[2]; or, if none, or the lapse is of the residue, it goes to the heir, and if there is no heir, it escheats to the Crown. If the property is personalty, it goes to the residuary legatee; or, if none, or the lapse is of the residue, it goes to the next-of-kin; and if there are no next-of-kin, but there is an executor, he takes for his own benefit; and, if no next-of-kin or executor, it goes to the Crown as *bona vacantia*[3]. In the case of gifts in joint tenancy, there can be no lapse if one of the joint tenants survives the testator; nor can there be any lapse in the case of a gift to a class if any member of the class survives the testator[4]. Thus a testator leaves property to A, B, and C, as joint tenants, and A predeceases the testator; here B and C take the whole. Again, if a testator leaves property equally "to the children of X," and X has, at the date of the will, three children, A, B, and C, and A predeceases the testator, here there is no lapse, as there would have been had the children of X been mentioned by name, but B and C take the whole, it being a gift to a class. And a gift "to A and the children of B equally" is also a gift to a class, so that if A dies before testator the whole goes to B's children[5].

No lapse in joint tenancies and gifts to a class.

A lapse may, in drawing a will, be prevented in two ways: (1) By the substitution of some other devisee, or legatee, should the original donee predecease the testator; (2) By giving the property to the beneficiary and his executors or administrators, or to him and his heirs, together with an express

Preventing a lapse.

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[1] *Elliott* v. *Davenport* (1705), Tudor's Conveyancing Cases, 475.
[2] *Mason* v. *Ogden*, ante, p. 547.
[3] Ante, pp. 547, 548.
[4] *Re Coleman* (1877), 4 Ch. D., 165; 46 L. J., Ch., 33.
[5] *Re Moss, Kingsbury* v. *Walter* (1901), A. C., 187; 70 L. J., Ch., 546; 84 L. T., 697. See also *Kekewich* v. *Barker* (1903), 88 L. T., 130.

declaration that there shall be no lapse[1]. As regards the first point, the substitution should be clear and definite, and not left to implication, but it has been held that if a legacy is given to a person *or* his personal representatives, or a devise is made to a person *or* his heirs, the intention of substitution is sufficiently shewn[2]. If, however, property is given to trustees upon trust for A for life, and then to B *or* his personal representatives, a lapse is not prevented by the word "*or*," for it may have reference to the death of B after the death of the testator but during the life of A[3]. As regards the second point, it must be noticed that a gift simply to a person and his personal representatives, or a gift to a person and his heirs, will not prevent a lapse; nor will a mere declaration that there shall be no lapse, standing by itself, prevent a lapse; but if the two things are combined, there is no lapse[4].

Statutory exception to lapse.

The Wills Act 1837 creates two statutory exceptions to the law of lapse, viz.: (1) Where there is a devise in fee tail, and the devisee dies leaving issue capable of inheriting[5]; (2) Where there is a devise, or bequest, to a child or other issue (grandchild) of the testator, who dies leaving issue living at the testator's death[6]. In both these cases the devise or bequest is to take effect as if the devisee or legatee had survived the testator[5], which, as to the first exception, must always mean that the next tenant in tail takes, but it does not at all follow, in the case of the second exception, that the child of the deceased child must necessarily take. Thus, suppose A devises Whiteacre to his son B, who predeceases A, leaving surviving him a son C, and

[1] *Sibley* v. *Cook* (1745), 3 Atk., 572.
[2] *Gittings* v. *McDermott* (1833), 2 M. & K., 69.
[3] Tudor's Conveyancing Cases, 479.
[4] Theobald on Wills, 640.
[5] 1 Vict., c. 26, sec. 32.
[6] Ibid., sec. 33.

a widow D, and having by his will given his whole property to D, and C and D are both living when A dies. There is no lapse, but it is not the child C who takes, but the widow D. This must have been the result if B had survived A, and the Act says that the property is to devolve as if B had survived A. This is well illustrated by *Re Hensler*, *Jones* v. *Hensler*[1]. A father, by his will, devised a freehold house to his son, who died in his father's lifetime, leaving issue living at his father's death, and having made a will whereby he devised all his real estate to his father. It was held that as under the Wills Act 1837[2] the son must be deemed to have survived his father, the property passed to the son absolutely, and became subject to his testamentary disposition; but that as, by the will of the son, the property was devised to his father, the devise by the son failed, and the son's heir-at-law was entitled to the property. Again, in *Re Hone's Trusts*[3], a testator gave property to a daughter, but directed that it should be deemed to be part of the funds comprised in her marriage settlement, and subject to the trusts thereof. The daughter died in her father's lifetime, leaving issue who were living at the father's death, and it was held that the property must be paid to the trustees of her settlement in just the same way as if she had actually survived her father[3]. However, there is a limit to this theoretical reasoning. In *Pearce* v. *Graham*[4] X, on her marriage, covenanted to settle any property she might afterwards during marriage acquire. She predeceased her father, but left surviving her husband and a child. Then, on her

Re Hensler.

Re Hone's Trusts.

Pearce v. *Graham.*

[1] (1882), 19 Ch. D., 612; 51 L. J., Ch., 303; 45 L. T., 672.

[2] 1 Vict., c. 26, sec. 33.

[3] (1883), 22 Ch. D., 663; 52 L. J., Ch., 295; 48 L. T., 266. See also *Eager* v. *Furnival* (1881), 17 Ch. D., 115; 50 L. J., Ch., 537; 44 L. T., 464, where it was held that a devise of realty to a daughter, being prevented from lapsing by section 33 of the Wills Act 1837, her husband, who was still living, was entitled to curtesy.

[4] (1863), 32 L. J., Ch., 359.

father's death, it was found that his will left her certain property, and there was, of course, no lapse by reason of the second exception contained in the Wills Act 1837. The question was, whether the property came within the covenant, as must have been the case had she actually, and not theoretically, survived her father. It was held that it did not. The distinction between *Re Hone's Trusts* and *Pearce* v. *Graham* is this: In the former case, the life being prolonged by the statute in order that the legacy might not lapse, the trust attached to the legacy went with it: in the latter case, the point was determined on the construction of the covenant, which was held only to apply to property acquired during an actual coverture.

Browne v. *Hammond.*

It has already been pointed out that there is no lapse in the case of a gift to a class[1], and, therefore, section 33 of the Wills Act 1837 can have no application to such a case[2]. Thus, a testator bequeaths property to trustees in the following words: "To be equally divided between my children." At the date of his will the testator had three children, A, B, and C, but A predeceases him, leaving issue living at the testator's death. B and C take the whole property. Had the father named his children, or given the legacy "between my three[3] children," it would have been otherwise, for the point of lapse would then have come into consideration, but, as it is, being a gift to a class, no such point arises.

Gifts to a class.

Where property is given to a class[4] of persons, as distinguished from a gift to them as separate individuals, care should be taken to shew clearly the

[1] Ante, p. 565.
[2] *Browne* v. *Hammond* (1859), Johns, 210; *Re Harvey's Estate* (1893), 1 Ch., 567; 62 L. J., Ch., 328.
[3] *Re Stansfield* (1880), 15 Ch. D., 84; 49 L. J., Ch., 750.
[4] As to what constitutes a class, see *Re Moss*, ante, p. 565.

persons who are intended to be included in the class; thus, in giving property to the "children" of a certain person, what children are intended to take should be clearly defined, or questions may arise after the testator's death. The following rules in connection with this point may be usefully enumerated :—

Four rules.

1. An immediate gift to children, whether of a living or of a deceased person, comprehends all those living at the testator's death, and those only, unless the words "to be born," or similar words, are added, in which event all children who may ever come into existence will take[1]. Thus, under a gift to "the children of A," although A may be living at the testator's death, this gift will include only A's children then living, and should A be dead, having had children who have died leaving children, the latter cannot take, for they are not children of A. If the gift is to the children of A "to be born," then the class cannot be determined until A's death.

2. Where a particular interest is carved out, with a gift over to the children of any person, such gift will embrace not only those living at the testator's death, but all who come into existence before the period of distribution. Thus gift to A for life, and then to his children; if, when the testator dies, A has two children only, B and C, each of these takes a vested interest, but subject to being proportionately divested by the birth of other children, so that if another child, D, is afterwards born, on the death of the parent B, C, and D will each take one-third[2].

3. Where there is a direct gift, but the period of distribution is postponed until the attainment of a given age by the children, and none have attained that age during the testator's lifetime, the gift will

[1] *Viner* v. *Francis* (1789), Tudor's Conveyancing Cases, 417; *Mogg* v. *Mogg* (1816), Mer., 654.
[2] Ibid.

apply to all who come into existence before the first child attains that age, but only to those[1]. If, however, any child has attained the age during the lifetime of the testator, the class is fixed at the testator's death[2]. Thus, gift by a testator to such of his grandchildren as shall attain 21. If at the testator's death no grandchild has attained 21, those grandchildren who may be born after his death will take, provided they are born before the first grandchild attains 21; but if at the testator's death any grandchild of his has attained 21, no subsequently born grandchild can take. This rule is one established to prevent the inconvenience that must arise from the impossibilty of ascertaining the class in some cases for a very long time, and the Court is not inclined to extend it, so that it has been held that it has no application to a gift of income, as no difficulty with regard to that can arise, as might be the case with regard to corpus[3].

4. Where there are no children in existence at the naturally proper period of distribution were there any children, then all the children, whenever born, are entitled. Thus, gift to the children of A, who at the testator's death has no children, all children A may afterwards have will participate[4].

Illegitimate children.

Under a gift to "children," only[5] legitimate children will be included, unless: (1) There are, at the testator's death, or at the date of the will, no legitimate children, and illegitmate children, who have obtained the reputation of being children of the person, are in existence[6]; or (2) The gift is in

[1] *Gimblett* v. *Purton* (1871), L. R., 12 Eq., 427; 40 L. J., Ch., 556.
[2] *Hagger* v. *Payne* (1857), 23 B., 474.
[3] *Re Wenmoth's Estate*, *Wenmoth* v. *Wenmoth* (1888), 27 Ch. D., 266; 57 L. J., Ch., 649.
[4] *Weld* v. *Bradbury* (1720), 2 Vern., 705.
[5] Williams on Executors, 855.
[6] Theobald on Wills, 238-241; *Re Eve* (1909), 1 Ch., 796; 78 L. J., Ch., 388.

the plural, and there is only one legitimate child, and there is, or are, another, or others, who, though illegitimate, have obtained the reputation of children; or (3) The gift is to children who cannot by possibility be legitimate, *e.g.*, children of a man who has married his niece or his divorced wife's sister; or (4) Some words are used shewing that illegitimate children are meant to be included, *e.g.*, a gift "to the four children of A," all of whom have the repute of being his children, although two of them are illegitimate[1]. A gift expressly to illegitimate children of the testator, or any other person, appears to be good and effectual as regards all who have obtained the reputation of being such children before the death of the testator; but, under a gift to the illegitimate children of a person other than the testator, no such children who are born after the testator's death can take, as to admit them would be to encourage immorality[2]. Whether a child is legitimate so as to be capable of taking under a devise or bequest to children depends on the law of its father's domicil[3]; and the same test is applied on intestacy as regards the succession to personalty[4], but it is otherwise as to English realty, as that can only be inherited by a person who is legitimate by English law[5].

Different kinds of wills.

Wills are, naturally, extremely varied in their character, and range from the simplest of dispositions to the most complicated. By wills, all sorts of trusts may be created, to the same extent, and governed by the same rules generally, as are applicable to similar trusts created by settlement.

[1] Theobald on Wills, 246; *Hill* v. *Crook* (1873), L. R., 6 H. L., 277; 42 L. J., Ch., 702; *Re Wood* (1902), 2 Ch., 542; 71 L. J., Ch., 723; 87 L. T., 316.

[2] *Occleston* v. *Fullalove* (1873), 9 Ch. A. C. 147; 43 L. J., Ch., 297; *Re Bocket* (1901), 2 Ch., 441; 70 L. J., Ch., 647.

[3] *Re Gray's Trusts* (1892), 3 Ch., 88; 61 L. J., Ch., 622.

[4] *Re Goodman's Trusts* (1881), 17 Ch. D., 266; 50 L. J., Ch., 425.

[5] *Doe* v. *Vardill* (1840), 7 Cl. & F., 895; 5 B. & C., 451.

As elaborate and complex dispositions of land, or of personal property, may be created by will as by settlement, and this is, in fact, often the case. The simplest possible kind of will, and one of very frequent occurrence, is where a man gives the whole of his property to his wife, or a wife the whole of her property to her husband. This may be accomplished in a very few lines, and a universal beneficiary should, as a rule, always be appointed executor. It is impossible to give here epitomes of different wills, but it may be useful to give an epitome of one which is of very frequent occurrence, viz., a will by a married man with children, where his main design is to provide for his wife and children. Even here, however, the will can only be given in the way of general suggestion, and must be subject to all particular desires on the testator's part:—

Epitome of will of a married man with children.

1. I, A B, of, etc., do hereby revoke all former wills and declare this to be my last will.

2. Appointment of executors and trustees, and appointment of guardian (usually wife) of infant children.

3. Bequest of furniture, etc., and of some sum of ready money to the wife.

4. Gifts of any other legacies, as may be desired.

5. Devise and bequest of residue of estate to the trustees, upon trust to sell and convert into money (with power to postpone date of sale and conversion), and to invest and hold upon trust.

6. To pay the income to the wife for her life.

7. At the wife's death, for the children equally, they to take vested interests on attaining 21, or, as to daughters, attaining that age or marrying under it.

8. Advancement clause.

9. Any extended powers of investment that may be desired.

10. Declaration that the power of appointing new trustees shall be vested in the wife during her life[1].

For a complete understanding of some clauses in the above epitome, the student is referred to the remarks made in the last chapter in connection with an ordinary marriage settlement of personal estate[2]. Whether the above idea is carried out, or not, must depend on circumstances, but it is a good general form of will, assuming the testator is possessed of something substantial in the way of property. Should his estate be very small, and it is manifest that the income cannot produce sufficient to maintain the wife, then, bearing in mind also that she is expected to keep the children who are not yet independent, it may be advisable to simply give the property absolutely to the wife, trusting to her to do what is right. The whole matter must be regarded in a practical light, and the practitioner must be prepared to make sensible and practical suggestions to his client with regard to the dispositions he proposes to make.

Codicil.

A testator who has made his will may desire to add to or alter it. A new will should then, as a rule, be made if the additions and alterations are considerable, but if this is not the case an addendum may be made to the will in the shape of a codicil, which is executed in the same way as a will is executed, and as to which all the rules with regard to wills equally apply. A codicil, though to some extent an independent document, yet in substance is read and considered as part of the original will, which must have effect given to it as varied by the codicil. A codicil, therefore, operates to revoke a will, to the extent that the codicil makes any

[1] 2 Prideaux, 648.
[2] Ante, pp. 512-522.

testamentary dispositions which are different to those in the will.

Revocation.

Irrespective of a codicil, a will is liable to be revoked in any of the following ways:—

1. By an entirely new will dealing with the whole of the testator's property.

2. By any instrument executed as a will, and expressing an intention to revoke the will.

3. By burning, tearing, or otherwise destroying the will, *animo revocandi*. A mere accidental destruction will not revoke a will, and, on the other hand, the intention to revoke by destruction will be of no avail without the act of destruction[1].

4. By the subsequent marriage[2] of the testator, unless the will is one made in the exercise of a power of appointment, and the property will not, in default of appointment, pass to the testator's heir-at-law or next-of-kin. Marriage is made to revoke a will because of the natural change in a man's position, and the probability that he would, after marriage, wish to make fresh testamentary dispositions. This he may postpone doing, and, therefore, it is best to make marriage itself revoke the will. This reasoning is inapplicable if the property cannot go to his relatives, should he die without a will. Before the Wills Act 1837, though the marriage of a woman revoked her will, it was not so as regards a man's will, unless and until issue was born of the marriage. There is now no such distinction[3].

Revival.

No will which has once been revoked can be revived except by another instrument, executed and attested as a will, and expressing an intention to

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[1] *Cheese* v. *Lovejoy* (1877), 2 P. D., 161; 46 L. J., P., 66.

[2] Whether the will of a foreigner is revoked by his or her marriage in England depends upon the law of the husband's domicil at the date of the marriage (*Loustalan* v. *Loustalan, Re Martin* (1900), P., 211; 69 L. J., P., 75; 82 L. T., 206).

[3] 1 Vict., c. 26, secs. 18-20.

revive it[1]. If a man, with a view of reviving a revoked will, destroys a will that he has subsequently made, there is no revival of the revoked instrument. Thus, A made a will in 1898, and in 1899 made a new will, which entirely revoked the former one, which, however, he still kept by him. In the year 1900 he came to the conclusion that the will of 1898 was preferable to that of 1899, and he, therefore, burnt his will of 1899, with the intention of thus restoring the former will. This cannot have the desired effect. If, however, A now dies, he does not die intestate, but the will of 1899 will be admitted to probate, if its contents can be proved, for it was only destroyed conditionally on the revival of the will of 1898. This is styled a dependent relative revocation—a doctrine which means that the destruction of a will under a mistake of law or of fact does not revoke it.

Dependent relative revocation.

It appears to be convenient, before concluding this chapter, to refer to the disposition of a testamentary nature, which is known as a *donatio mortis causâ*. This is a gift of personal property, made by a person who apprehends that he is in peril of death at the time, and is evidenced by a delivery of the property, or the means of obtaining the possession thereof, to the donee, and an implied condition accompanies the gift that it is revocable at pleasure, and, further, it is necessarily revoked if the donor recovers. Delivery, words of gift, an expectation of death, and an intention on the part of the donor that the chattel shall revert to him in case of his recovery, are therefore the essential features of a *donatio mortis causâ*; but, just as in an ordinary gift, the delivery may precede, or may be contemporaneous with, or may follow, the words of the gift[2]. A *donatio mortis causâ*

Donatio mortis causâ.

Cain v. *Moon.*

[1] 1 Vict., c. 26, sec. 22.

[2] *Cain* v. *Moon* (1896), 2 Q. B. D., 283; 65 L. J., Q. B., 587; 74 L. T., 728.

possesses some of the elements of a gift *inter vivos*, and some of the elements of a bequest. True, it vests in the donee, quite irrespective of the executor, by the delivery in the deceased's lifetime, and technically no assent on the executor's part is required to perfect the donee's title, so that to this extent it resembles a gift *inter vivos*. On the other hand, it is revocable, it is liable to both estate duty and legacy duty, and it is liable for the debts of the donor if there is not otherwise a sufficiency of assets, so that for such a purpose it may be the executor's or administrator's duty to claim the subject of the *donatio* back from the donee. Again, it may be an imperfect *donatio*, or it may be of property not capable of being made the subject of such a gift; thus a railway certificate cannot be given by way of a *donatio mortis causâ*[1], nor can the deceased's own cheque[2], unless cashed[3], or paid away for value[4], during his lifetime; but the cheque of a third person payable to the deceased, or a promissory note, or bill of exchange payable to him, may be given in this way, even although not indorsed by him[5], and so may a banker's deposit note for money deposited at the bank by the donor[6].

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[1] *Moore* v. *Moore* (1874), L. R., 18 Eq., 474; 43 L. J., Ch., 617.
[2] *Re Beaumont* (1902), 1 Ch., 889; 71 L. J., Ch., 478; 86 L. T., 410.
[3] *Hewitt* v. *Kay* (1868), L. R., 6 Eq., 198; 37 L. J., Ch., 633.
[4] *Rolls* v. *Pearce* (1877), 5 Ch. D., 730; 46 L. J., Ch., 791.
[5] *Clements* v. *Cheeseman* (1885), 27 Ch. D., 631; 54 L. J., Ch., 158; 33 W. R., 40.
[6] *Re Duffin, Duffin* v. *Duffin* (1890), 44 Ch. D., 76; 59 L. J., Ch., 420; 62 L. T., 614.

CHAPTER XVII.

REGISTRATION.

It is desired in this chapter to bring before the reader the necessity, or advisability, of registration or enrolment of instruments affecting property, and particularly also to deal with the subject of registration in Middlesex and Yorkshire, and, still more specially, under the Land Transfer Acts 1875 and 1897. The majority of the cases in which registration or enrolment is proper, and, in some cases actually necessary, have from time to time been pointed out, but it will be convenient to now collect them together:

1. An instrument creating an annuity and charging it on lands, unless it is a marriage settlement or a will, requires registration in the Land Registry, under 18 & 19 Vict., c. 15, otherwise purchasers and mortgagees of the land on which it is charged will not be affected by it unless they have notice[1].

2. Bills of sale require registration in the Central Office within seven days after execution, under the Bills of Sale Acts 1878 and 1882, otherwise as to absolute bills of sale they will be void against execution creditors or trustees in bankruptcy, and, as to conditional bills of sale they will be void as regards the chattels comprised therein[2].

3. A deed of arrangement with creditors must, under the Deeds of Arrangement Act 1887, be registered at the Central Office within seven days of execution in similar manner to a bill of sale, otherwise it will be void[3].

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[1] Ante, p. 385.
[2] Ante, p. 498.
[3] Ante, p. 386.

4. All writs of elegit, orders appointing receivers by way of equitable execution, other writs and orders affecting land, statutory land charges, and deeds of arrangement with creditors which comprise lands, require registration at the Land Registry, under the Land Charges Act 1888, or they will not bind the lands as against purchasers, etc.[1]

5. A *lis pendens* requires registration at the Land Registry, under 2 & 3 Vict., c. 11, and will not bind a purchaser or mortgagee, without notice, until thus registered[2].

6. An assurance of land by deed to a charity requires enrolment in the Central Office within six months of execution, under the Mortmain Act 1888, otherwise it will be void. But assurances for parks, museums, and school houses, must, instead, be enrolled with the Charity Commissioners within six months of coming into operation[3].

7. A disentailing assurance requires, to make it effectual, that it should be enrolled in the Central Office, under the Fines and Recoveries Act 1833, within six months of execution[4].

8. A power of attorney[5] may, by the Conveyancing Act 1881, for the sake of record and convenience, be deposited or filed in the Central Office, and substantially enrolled there[6].

9. Conveyances and leases of Crown Lands require to be enrolled in the office of Land Revenue Records and Enrolments[7].

10. Assignments of patents must be registered at the Patent Office, under the Patents and Designs Act 1907[8]; and assignments of copyright must be

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[1] Ante, pp. 199, 385.
[2] Ante, pp. 201, 385.
[3] Ante, pp. 190, 192.
[4] Ante, p. 162.
[5] Ante, p. 348.
[6] 44 & 45 Vict., c. 41, sec. 48.
[7] 16 & 17 Vict., c. 56, secs. 6, 7.
[8] 7 Edw. VII., c. 29, secs. 28, 66, 67, 71.

registered at Stationers' Hall, under the Copyright Act 1842[1].

11. Mortgages and transfers of British ships, or any share thereof, require registration at the port at which the ship is registered, under the Merchant Shipping Act 1894[2].

12. Certificates of the acknowledgment of deeds executed before 1883 by married women require to be enrolled in the Central Office, under the Fines and Recoveries Act 1833 and Conveyancing Act 1882[3].

13. In some miscellaneous cases instruments may be enrolled in the Enrolment Department of the Central Office for the purpose of preserving a record thereof, *e.g.*, a deed executed under the Settled Land Act 1882 for the purpose of the dedication of land for streets, squares, or open spaces[4], or a deed recording a change of name.

14. By the Bedford Level Act[5], all conveyances, and all leases exceeding seven years, of lands comprised in the Act require registration at the "Fen Office" at Ely, to render them effective.

Registration in Middlesex and Yorkshire.

15. The Middlesex Registry Acts 1708[6] and 1891[7], and the Yorkshire Registry Acts 1884[8] and 1885[9], provide for the registration of all assurances affecting a devolution of land in those counties (with certain exceptions). As to Middlesex, the authority for the registration, and the general law with regard to it, are found in the Acts of 1708 and 1891, which latter Act transferred the old Middlesex Registry, which formerly existed, to the office of the Land Registry, where all registrations

[1] Ante, p. 113.
[2] Ante, p. 503.
[3] Ante, pp. 69, 352.
[4] Ante, p. 175.
[5] 15 Car. II., c. 17.
[6] 7 Anne, c. 20.
[7] 54 & 55 Vict., c. 64.
[8] 47 & 48 Vict., c. 54. This Statute repeals the earlier Acts regarding registration in Yorkshire.
[9] 48 & 49 Vict., c. 26.

now take place, a provision which is convenient, having reference to the subject of registration under the Land Transfer Acts 1875 and 1897, presently dealt with. Registration in Yorkshire is effected in the Yorkshire Registries, and the authority for such registration, and the general law with regard to it, are found in the Acts of 1884 and 1885.

Middlesex.

Dealing first with Middlesex, it is provided[1] that a memorial of all instruments concerning land in the county of Middlesex may be registered; and that every deed or conveyance affecting the same shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for value, unless registration of it is thus effected before registration is effected of the subsequent assurance; and that every devise shall be adjudged fraudulent and void against every subsequent purchaser or mortgagee unless the will is duly registered, which registration is to be effected within six months of death, or three years if testator died abroad. The following exceptions to the necessity for registration are, however, made: (1) Copyholds; (2) Leases at a rack rent; (3) Leases not exceeding 21 years, where the actual possession and occupation go with the lease; (4) Land in the City of London; and (5) Chambers in Serjeants' Inn or any of the Inns of Court or Chancery[2].

Exceptions.

Effect of not registering.

It is manifestly, therefore, of considerable importance to register in Middlesex; but if registration is not effected, it by no means follows that any very serious result will ensue, for it has been held that the object of registration being only to secure subsequent purchasers and mortgagees against prior secret dispositions, if a person takes with notice of a prior unregistered disposition, he takes subject to it[3].

Le Neve v. *Le Neve.*

[1] Middlesex Registry Act 1708 (7 Anne, c. 20), secs. 1, 8.
[2] Ibid., sec. 17.
[3] *Le Neve* v. *Le Neve* (1747), 2 Wh. & Tu., 175.

Further, it is provided by the Vendor and Purchaser Act 1874[1], that where the will of a testator devising land in Middlesex has not been registered within the prescribed period, an assurance of such land to a purchaser, or mortgagee, by the devisee, or some person deriving title under him, shall, if registered before, take precedence of, and prevail over, any assurance from the testator's heir-at-law.

Vendor and Purchaser Act 1874, sec. 8.

The mode of registering is by preparing a memorial, containing short details of the instrument to be registered, which is signed by either the grantor, or grantee, under such instrument, or, in the case of a will, by some, or one, of the devisees, or by his or her heirs, executors, administrators, guardians, or trustees, and is attested by a witness who must, in the case of an instrument *inter vivos*, have been an attesting witness thereto, unless such witness is dead, or abroad, or cannot be found. The memorial is lodged, together with the deed or other instrument required to be registered, and such deed or other instrument is afterwards delivered out from the registry marked with a note of the fact and date of registration. Provision is made for searching the register, which may be an official search if desired[2], and to make such a search on purchasing, or taking a mortgage of, property in Middlesex is very important. Still, mere registration of an instrument does not always ensure safety, for an equitable charge may be registered, and then there may be a conveyance to a *bonâ fide* purchaser, or mortgagee, who has omitted to search, and has taken the conveyance or mortgage without notice, and who will, in that event, have priority, for having omitted to search the register is not in itself notice. It appears, however, that if a search was actually made,

Mode of registering.

Registration not in itself notice.

[1] 37 & 38 Vict., c. 78, sec. 8. See hereon, Dart, 701, 702.
[2] Middlesex Act 1891, Schedule 1.

the purchaser or mortgagee will be charged with notice, although the fact of the registration may have escaped him[1].

Credland v. *Potter*.

A further charge is a conveyance requiring registration, and will be void as against a subsequent registered mortgage, and not merely postponed to it, so that it cannot be tacked to the registered first mortgage[2].

No registration under Middlesex Acts if registration effected under Land Transfer Acts.

If land is registered under the Land Transfer Acts 1875 and 1897, no local registration is any longer necessary[3], but it must be borne in mind that the geographical County of Middlesex is not the same thing as the Administrative County of London; and further, that there are certain estates and interests in property not the subject of registration under the Land Transfer Acts[4], as to which, therefore, registration should still be effected under the Middlesex Registry Acts.

Yorkshire.

Dealing next with Yorkshire, it is provided[5] that all assurances affecting lands in Yorkshire may be registered. Every instrument *inter vivos* is to have priority according to the date of registration, and every will entitled to be registered, according to the date of the testator's death, if registration is effected within six months of death, but if not, then according to the date of registration; subject, however, to this, that if it is impossible to register the will within six months, a notice of it may be registered within that time, and then if the will is duly registered within two years of death, it will be deemed to have been registered at the time of the notice[6]. This priority

[1] 1 Prideaux, 76.
[2] *Credland* v. *Potter* (1875), L. R., 10 Ch., 8; 44 L. J., Ch., 169.
[3] Post, p. 591.
[4] Post, p. 586.
[5] Yorkshire Registries Act 1884 (57 & 58 Vict., c. 54).
[6] Ibid., sec. 11.

is absolute, notwithstanding any notice of a prior unregistered interest, except only in cases of actual fraud[1]. This is a very important point, and differs from the position in Middlesex, where, as we have seen, a person by registering does not obtain priority over dispositions of which he had notice. With regard to the position of an heir, it is provided that he may register an affidavit of the death of his ancestor intestate, and in that case an assurance for valuable consideration made by him will have priority over any will that may thereafter be found, and which is registered after the assurance, and after six months from the testator's death[2]. With regard to a disposition for value by a devisee under an unregistered will, the provision in the Vendor and Purchaser Act 1874, already referred to, applies equally to Yorkshire. A vendor's lien on land, and an equitable mortgage by deposit, must be registered to get priority[3]. Tacking is not allowed[4].

Absolute priority by registration.

Heir.

Devisee.

Ante, p. 581.

Registration in Yorkshire may be effected by memorial in similar manner to what has been stated as regards Middlesex; but, if preferred, instead of preparing a memorial, a full copy of the deed, will, or other instrument, may be lodged[5]. A note of the fact and time of registration is duly indorsed on the instrument registered. Provision is made, in similar manner as in Middlesex, for searches in the registry being made.

How registration effected.

The following are exempted from the necessity of registration in Yorkshire, viz.: (1) Copyholds; (2) Any lease not exceeding 21 years, or any assignment thereof, when accompanied by actual possession

Exceptions.

[1] Yorkshire Act 1884, sec. 14; Yorkshire Act 1885, sec. 4.
[2] Yorkshire Act 1884, sec. 12.
[3] Ibid., sec. 7. See *Bettison* v. *Hobson* (1896), 2 Ch., 403; 66 L. J., Ch., 695; 74 L. T., 689.
[4] Ibid., sec. 16.
[5] Ibid., sec. 4.

from the making of such lease or assignment[1] If the land in Yorkshire happens to be registered under the Land Transfer Acts 1875 and 1897, no local registration is any longer necessary[2].

It is, manifestly, of the greatest importance, as regards land in Yorkshire, to make a search in the local registry before completing any transaction. No doubt it is important in Middlesex, but, as absolute priority is obtained by registration in Yorkshire, it is much more important there.

16. Land Transfer Acts.

The Yorkshire and Middlesex Registry Acts simply created registers of documents. But there is also in operation in England a register of titles to freeholds and leaseholds. This register of titles was introduced by the Land Registry Act 1862[3], and this was superseded by a revised system introduced by the Land Transfer Act 1875[4]. The registration of titles under these Acts was purely voluntary, and failed to attract popular support. The system was further revised by the Land Transfer Act 1897[5], which contained provisions for making registration of title compulsory; but at present such compulsion only applies to the County and City of London, though it can be extended to any other county by Order in Council if the county council so resolves at a meeting at which two-thirds of the whole council are present[6].

Registration of title is carried on at the Land Registry Office in London, and (whether voluntary or compulsory) is now governed by the Land Transfer Acts 1875 and 1897, and the Consolidated Land Transfer Rules 1903, 1907, and 1908, and the

[1] Yorkshire Act 1884, sec. 28.
[2] Post, p. 591.
[3] 25 & 26 Vict., c. 53.
[4] 38 & 39 Vict., c. 87.
[5] 60 & 61 Vict., c. 65.
[6] Ibid., sec. 202.

forms annexed thereto. It is not to be expected that the student can sit down and master two long and complicated statutes and 345 rules. And it is only proposed here to give a general sketch of the subject.

Beginning of compulsory registration.

Compulsory registration of title in London came into operation on the following dates:—

1899. Jan. 1.—In the parishes of Hampstead, St. Pancras, St. Marylebone and St. George's Hanover Square.

1899. Mar. 1.—In the parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's-in-the-East, Shadwell, Ratcliff, Limehouse, Bow, Bromley and Poplar.

1899. Oct. 1.—In the rest of London County north of the centre line of the River Thames, except North Woolwich.

1900. Jan. 1.—In the parishes of Christ Church, Southwark, St. George-the-Martyr, Camberwell, Horsleydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olave and St. Thomas, St. Saviour, and the detached part of Streatham between Lambeth and Camberwell.

1900. May 1.—In the parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the rest of Streatham.

1900. July 1.—In the rest of London County.

1902. July 1.—In the City of London.

Meaning of compulsory registration.

When registration of title is compulsory, the effect is as follows: (1) Upon a conveyance on sale, in the commercial sense, of an estate in fee simple in possession, the purchaser does not get the legal estate unless or until he is registered as proprietor[1]. (2) An assignment on sale of a lease or underlease having at least 40 years to run or two lives to fall in, and a grant of a similar lease or underlease, respectively, only operates as an agreement, and does not pass any legal estate to the assignee or lessee unless or until he is registered as proprietor; but when such assignees or lessees are trustees under the Settled Land Acts, they get the legal estate if the tenant for

[1] 1897 Act, sec. 20; 1875 Act, secs. 2, 4, 5.

life is registered as proprietor[1]. One result of non-registration on a sale of leaseholds is clearly that the assignor still remains liable to the lessor on all covenants which run with leasehold land under *Spencer's Case*[2].

When registration is compulsory, it seems[3] that the Acts and Rules only compel a first registration, and that afterwards the legal estate can be conveyed by an unregistered deed. But if this unregistered conveyance is not protected by an entry on the register, the registered proprietor can defeat it by a registered transfer for value[4]. It is therefore conceived that a title once compulsorily registered will continue to be dealt with on the register. A title voluntarily registered in a district where compulsion is not in force can now be removed from the register altogether[5].

Exemptions.

It is, however, never compulsory to register the title to incorporeal hereditaments, mines and minerals conveyed apart from the surface, an undivided share in land, and a few other interests[6]. In no case can there be registration of a lease having less than 21 years to run, or of a lease which contains an absolute prohibition against alienation, or of a term created for mortgage purposes[7]. Leases with over 21 but less than 40 years to run, or for one life only, may be registered.

Who can register.

We will now proceed to deal with a first registration of title, whether voluntary or compulsory,

[1] Rules 68-73.
[2] Ante, p. 380.
[3] *Capital & Counties Bank* v. *Rhodes* (1903), 1 Ch., 631; 72 L. J., Ch., 336; 88 L. T., 255.
[4] 1875 Act, secs. 30-38.
[5] 1897 Act, sec. 17.
[6] Ibid., sec. 24.
[7] 1875 Act, sec. 11; 1897 Act, Schedule 1.

bearing in mind that the only titles which can be registered are those to (*a*) the fee simple in possession and (*b*) certain leaseholds. The persons who can apply to register a title are: (1) Any person who has contracted to buy the fee simple or a leasehold capable of registration, but in this case the consent of the vendor is necessary; (2) Any person who is entitled for his own benefit, at law or in equity, to the fee simple or to a leasehold capable of registration, or who is capable of disposing thereof for his own benefit by way of sale[1]. The existence of incumbrances is no bar to the application to be registered[1]. The registration may be in the name of the applicant or of his nominees[1]. Settled land may be registered in the name of the tenant for life, *or* in the names of any trustees with power of sale, *or* in the name of anyone who has an over-riding power to appoint the fee simple[2]—naturally in practice the tenant for life will be registered. A trustee for sale may apply to be registered as proprietor[3], and should. A trustee, or mortgagee, or other person having a power of sale, may apply to be registered[3]. It is, however, provided that no person dealing with registered land shall be affected by notice of any trust, and references to trusts shall, as far as possible, be excluded from the register[4]. On applying for registration, all necessary documents of title must be produced to the registrar, who is to notify, on such of them as he thinks proper, the fact of registration, so that persons may thereafter have notice that the title has been registered[5].

Ante, p. 585.

Settled land.

Trusts.

The applicant may be registered, whether the property is a fee simple or leasehold, as proprietor

Modes of registering.

[1] 1875 Act, secs. 5, 11.
[2] 1897 Act, sec. 6.
[3] 1875 Act, sec. 68.
[4] 1897 Act, Schedule 1.
[5] Rules 19, 46, 317, 321.

with: (1) An absolute title[1], or (2) a qualified title[2], or (3) a possessory title[3], or (4) as regards leaseholds only, with a good leasehold title[4]. But even in a district where registration is compulsory, it is only necessary to register with a possessory title[5]. The effect of these different registered titles must be thoroughly understood.

Absolute title.

The effect of registration as first proprietor of freeholds with an absolute title[6] is to vest in him a statutory estate in fee simple, which is subject to: (1) Any incumbrances entered on the register, and (2) such liabilities as section 18 of the 1875 Act declares are not to be deemed incumbrances, and (3) if he is not entitled for his own benefit as between himself and any persons claiming under him, any unregistered estates or rights or equities possessed by such persons. If leaseholds are registered with an absolute title[7], the first proprietor gets the leasehold estate, subject to the same three things as just mentioned, and also subject to the covenants, obligations and liabilities annexed to the lease, but with a guarantee that the lessor had power to grant the lease. The idea is, that by registering in this manner, the registered owner shall obtain an indefeasible title, and, as we shall presently see, it is now also a guaranteed title.

Liabilities not incumbrances.

The liabilities which section 18 of the 1875 Act says are not to be deemed incumbrances, and which the registered owner is in all cases still subject to, include liability to repair highways by reason of tenure, quit rents, heriots, land tax, tithe rent-charge, rights of common, easements, rights to

[1] 1875 Act, sec. 7; Rules 24-35, 42, 52, 53, 55.
[2] Ibid., sec. 9; Rules 36, 58, 59.
[3] Ibid., sec. 8; Rules 37, 57.
[4] Rules 52, 53, 54, 56.
[5] 1897 Act, sec. 20.
[6] 1875 Act, secs. 7, 18.
[7] Ibid., sec. 13; Rule 55.

mines, and leases not exceeding 21 years[1]. As regards succession duty and estate duty, these must be noted on the register, and, unless that is done, a subsequent *bonâ fide* registered proprietor for value is free from any liability for them, notwithstanding he may have extraneous notice[2].

Qualified title.

A qualified title is substantially the same as an absolute title, but with qualification, and registration can be so effected when it appears the title can only be established for a limited period or subject to certain reservations. In such case, the registration excepts from the effect of an absolute registration any estate, right, or interest arising before a specified date, or arising under a specified instrument, or otherwise particularly described in the register. The registered proprietor here has an absolute title, and, as we shall presently see, a guaranteed title save only as regards the enforcement of any estate, right, or interest appearing by the register to be excepted[3].

Possessory title.

Registration with a possessory title merely signifies that the person on the register is the *primâ facie* owner for the estate thereon appearing, and the registration does not affect, or prejudice, the enforcement of any estate, right, or interest, adverse to or in derogation of the title of the registered proprietor, and subsisting, or capable of arising, at the time of registration of such proprietor[4]. A person, therefore, by registering in this manner gains no immediate advantage whatever, save that he does (where registration is compulsory) get the legal estate, and that he can deal with the land in the manner provided by the Acts. He gets, however, an ultimate advantage, for where land has been registered with a

[1] 1875 Act, sec. 18.
[2] 1897 Act, sec. 13.
[3] 1875 Act, sec. 9.
[4] Ibid., sec. 8.

possessory or qualified title for upwards of six years and the first registered proprietor was a purchaser on sale, and an application is then made for an absolute title, the examination of title may be modified as the registrar thinks fit[1]. It seems probable that this discretion will be used by waiving expensive and troublesome inquiries where the title deeds are in possession of the applicant, in reliance on the quasi-publicity of the six years' registration, the advertisement of the application, and the inference that the first registered owner properly investigated the title when he bought.

Good leasehold title.

An absolute title to leaseholds includes a guarantee of the lessor's title to grant the lease[2]. But as a lessee can seldom produce his lessor's title, leaseholds were at first usually registered either with a qualified title expressly excepting the title of the lessor or with a possessory title. The Rules[3] now allow registration with a good leasehold title, which is the same as an absolute title, excepting only the lessor's title to grant the lease. If the original lessee is the applicant, he is registered with a good leasehold title as a matter of course. The practical effect as regards sales will be that of an absolute title, because a purchaser of leaseholds cannot call for the lessor's title without specially bargaining for it.

Compensation for errors by means of an insurance fund.

It is provided that where any error or omission is made in the register, or where any entry in the register is made or procured by, or in pursuance of, any fraud[4] or mistake, and is not capable of rectification, any person suffering loss thereby is to be

[1] Rule 27. This also is the case when the land has been sold or purchased under an order of Court, or if the title has been fully investigated before the application to register, ibid.

[2] Rule 55.

[3] Rules 52-56.

[4] *Attorney General* v. *Odell* (1906), 2 Ch., 47 ; 75 L. J., Ch., 425 ; 94 L. T., 659.

entitled to be indemnified if it was not caused by his own fault. Where indemnity is paid for a loss, the registrar, on behalf of the Crown, is entitled to recover the amount paid from any person who has caused, or substantially contributed to, the loss by his act, neglect, or default. An indemnity fund is provided by setting aside, at the end of each financial year, a portion of the fees taken at the registry, and, if this is insufficent, the deficiency is charged on the Consolidated Fund[1]. It will be perceived that, by reason of these provisions, an absolute title is now really a guaranteed title; as also is a qualified title, subject only to its particular exceptions. As regards a possessory title, there being no absolute title, there is, of course, no guaranteed title, but compensation may be obtained for errors.

Removing land from registry.

When a title is once registered under these Acts, it ceases to be subject to any local registration in Middlesex or Yorkshire[2], unless and until it is removed from the register, which can be done except in an area where registration is compulsory[3]. This, however, does not apply to estates and interests excepted from the effect of registration under a possessory, or a qualified title, or to an unregistered reversion on a leasehold title, or to dealings with incumbrances created prior to the registration of the land[4].

Priority notice.

A person interested in unregistered freeholds or leaseholds, *e.g.*, a mortgagee, can lodge a caution to prevent the title being registered without notice to him[5]. A person who can apply for first registration—*e.g.*, a purchaser of land in a compulsory district—

[1] 1897 Act, secs. 7, 21; 1875 Act, secs. 95, 96.
[2] 1875 Act, sec. 127; Rule 48.
[3] 1897 Act, sec. 17.
[4] Ibid., Schedule 1.
[5] 1875 Act, sec. 60; Rules 88, 226.

can lodge a priority notice which gives his subsequent application priority from the date of the notice[1]; and where the title is registered, a priority notice can be lodged in respect of a future specified instrument or application[2].

Mode of obtaining registration.

If an owner desires to register with an absolute, or a qualified title, it is first necessary that his title shall be approved by the registrar, but, on registering with a possessory title, the applicant may be registered on giving such evidence of title as may be prescribed[3]. It is only reasonable that, if a person is to have an absolute, or a qualified title (which is in effect an absolute title), his title should be most thoroughly investigated, but, in the case of a possessory title, there is no such need, and the veriest *primâ facie* evidence of present ownership ought to be sufficient.

Absolute title.

If an absolute title is sought, Rules 24 to 35 must be complied with. A signed application form is lodged, together with an abstract of title, and all deeds, documents, opinions of counsel, contracts of sale, requisitions on title, etc., relating to the title which the applicant has, and a list of any tenants. The registrar then has the title fully investigated. Advertisements are inserted in the *London Gazette* and other newspapers. If signed notice of objection to registration is left at the registry, such objection is decided by the registrar, with an appeal to the senior judge of the Chancery Division by motion or summons[4]. No absolute title can be had to leaseholds unless the registrar approves the title to the leasehold and to the freehold and to any intermediate leasehold[5].

[1] Rule 95.
[2] Rule 117.
[3] 1875 Act, sec. 6; Rules 35, 53.
[4] Ibid., sec. 17; Rules 18-35, 296-312.
[5] Rule 53.

Qualified title.

On application for an absolute title, if the registrar on examining the title is of opinion that a qualified title only ought to be registered, then on request in writing of the applicant he may be registered with a qualified title[1].

Possessory title.

A possessory title can be registered with very little trouble[2]. A signed application is lodged, together with all original deeds and documents relating to the title, and a copy or abstract of the latest document of title, not being a record, in the applicant's possession, must also be lodged. If the property is leasehold, the lease, or a copy or abstract, or sufficient evidence of its contents, must also be lodged[3]. The application must be accompanied by sufficient particulars, by plan or otherwise, to enable the land to be identified on the ordnance map. It is not necessary to state what (if any) incumbrances the land is subject to, but if any such statement is made it will be entered on the register. If the documents lodged afford *primâ facie* evidence of the title, the applicant is then registered with a possessory title[4]; but if the registrar is of opinion the documents make out an absolute title, he can (unless the applicant, on notice, objects) register him with an absolute title[5]; and if the registrar is of opinion an absolute title can be registered after a certain time or event, he can then (unless the applicant objects) convert the possessory title into an absolute title[6].

Certificate.

In whichever way the owner registers, there is delivered out to him a land certificate, unless he prefers that it shall be kept in the registry[7].

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[1] Rules 36, 58.
[2] Rules 18, 19, 37.
[3] Rule 51.
[4] Rule 37.
[5] Rule 39.
[6] Rule 42.
[7] 1897 Act, sec. 8; Rules 47, 65.

Title to be shewn on dealing with registered land.

A title having been registered, it is well to pause for the purpose of considering what title will afterwards, on any dealing with it, have to be shewn. It is provided[1] that a purchaser of registered land under an open contract shall not require any evidence of title, except: (1) The evidence to be obtained from an inspection of the register, or a certified copy of it; (2) A statutory declaration as to the existence or not of matters[2] which section 18 of the 1875 Act declares not to be incumbrances; (3) If the proprietor is registered with an absolute title, and there are incumbrances entered on the register as existing at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge; (4) If the proprietor is registered with a qualified title, the evidence on points 1, 2 and 3 just mentioned, and evidence as to the estates and interests excluded from the registration; (5) If the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land, as the purchaser would be entitled to if the land had never been registered. If, therefore, the title has been registered as absolute, and probably also if registered as qualified, the abstract will be a very short affair. But if the registration is merely with a possessory title, the abstract will go back 40 years and will comprise (*a*) all the documents affecting the title up to the date of first registration, (*b*) a certified copy of the entries on the register, and (*c*) a supplemental abstract of the title to any interest subsisting or capable of arising at the date of first registration.

Ante, p. 588.

No title gained by adverse possession.

A very extraordinary advantage of registration must be noticed. No title to registered land adverse to, or in derogation of, the title of the registered

[1] 1897 Act, sec. 16.
[2] Ante, p. 588.

proprietor can be acquired by any length of possession merely, and the registered proprietor may at any time bring an action to recover possession of the land accordingly[1]. But where a person would (but for this enactment) have obtained a title by the Statutes of Limitation, he may apply for an order to rectify the register, by placing him on it as the registered owner, and the Court may make the order subject to any estates or rights acquired by registration for valuable consideration under the Acts[1]. It is, however, provided that the registration of any person as first proprietor with possessory title only, shall not prejudice the claim against him of any other person who was in adverse possession of the land at the date of such registration[1]. The effect of these provisions may be illustrated as follows: If the first registration of title is by A (whether absolute, qualified, or possessory) and B is then in adverse possession and has been for say 10 years, at the end of another two years B can apply as against A to have his name put on the register instead of A's, unless within the two years A either brings an action to eject B or conveys for value to C who duly registers. If, however, C lets B stop in undisturbed possession for 12 years from the registration of C, then B can apply as against C and any volunteer claiming under C, to have himself registered as proprietor instead of C or such volunteer. Again, if a registered owner creates a mortgage, or charge, and the mortgagee, or chargee, goes into possession, the registered title of the mortgagor is not barred by lapse of time, but at the end of 12 years without acknowledgment the chargee can apply to be registered as proprietor of the land instead of the mortgagor, though he will take subject to all other registered rights created for value, *e.g.*, a second charge within such 12 years.

Illustration

[1] 1897 Act, sec. 12.

Mode of dealing with registered land.

It is now necessary to consider how, when a title has been placed on the register, the land is thereafter to be dealt with. The general answer to such a question is, that it must strictly, for the purpose of passing the full estate and interest of the owner, be dealt with by the forms prescribed by the rules issued under the Acts, but that it may sometimes be necessary or, at any rate, advisable to resort to instruments such as would have been used had the land not been registered, in addition to the statutory forms; and that, subject to not getting the legal estate, and to risks and possibilities that may ensue by reason thereof, instruments such as would have been used if the land had never been registered, may, by themselves, be had recourse to. This appears, indeed, an extraordinary state of things.

Registered dealings.

Forms of registered transfers, or conveyances of registered land, are given in the rules, and the effect of these transfers has to be regarded according to whether the owner is registered with an absolute, a qualified, or a possessory title. In the case of an absolute title, a registered transfer for valuable consideration passes to the transferee the whole estate and interest of the owner, subject only to any incumbrances entered on the register, and to any rights and liabilities which may be existing and which are not deemed to be incumbrances, and, in the case of leaseholds, to all express covenants, obligations, and liabilities incident to the property[1]. In the case of a qualified title, the position on a transfer for value is the same, except that the transferee is subject to any rights, or interests, appearing by the register to be excepted[2]. In the case of a possessory title, the position on a transfer for value is the same

[1] 1875 Act, secs. 29, 30, 34, 35.
[2] Ibid., sec. 31.

as on an absolute title, except that it does not operate to the prejudice of any right, or interest, adverse to or in derogation of the title of the first registered proprietor, and subsisting, or capable of arising, at the time of the registration of such proprietor[1]. If the transfer is a voluntary one, then the transferee is not only subject, as above, according to the way in which the title is registered, but however it may be registered he also takes subject to any unregistered estates, rights, interests, or equities to which the transferor was subject[2].

Voluntary transfers.

Unless otherwise stipulated, a vendor of land registered with an absolute title cannot be required to enter into any covenants for title. In the case of a qualified title, there is no guarantee as regards those matters excluded from the registration, and, therefore, covenants for title have to be given in respect of those matters, but not further, for beyond them there is a guarantee of title. In the case of a possessory title, as there is no guarantee of title at all, the covenants for title must be given, but (unless otherwise agreed) only relate to estates and interests excluded from the effect of registration, and the implied covenants for title under section 7 of the Conveyancing Act 1881 are to be construed accordingly[3]. The prescribed instrument of transfer of freeholds (Form 20) to a purchaser is a deed attested by one witness, which—after stating the district, parish, number of title, and date—runs "In consideration of pounds (£) I, A B, of, etc., hereby transfer to C D, of, etc., the land comprised in the title above referred to." In all cases, a receipt for the consideration should be added to the Form, and

Covenants for title.

Form of transfer.

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[1] 1875 Act, sec. 32.
[2] Ibid., secs. 33, 38.
[3] 1897 Act, sec. 16 (3).

the words " in fee simple " should be added after the purchaser's name; and whenever possible the words " as beneficial owner " should be added after the vendor's name and a declaration that the implied covenants for title include the things named in section 18 of the 1875 Act[1]. The statutory acknowledgment and undertaking as to documents retained[2] can also be added. Restrictive conditions can be put in[3]. If the vendor of registered land is not himself registered, he must at his own expense and notwithstanding express agreement to the contrary, either procure himself to be registered, or procure a transfer from the registered proprietor to the purchaser[4].

Leaseholds.

On all transfers of leaseholds, unless an entry is made in the register to the contrary, there is implied a covenant on the part of the transferor that all rent has been paid and covenants performed, and a covenant on the part of the transferee to pay rent and to perform the covenants in the future[5].

Death, and bankruptcy.

In the event of a devolution of registered land by reason of death[6] or bankruptcy[7], provision is made for the title being registered in the name of the proper person. However, personal representatives may assent to a devise, or convey to the heir, without being themselves first registered as the proprietors, the devisee or heir being then registered[8]; and it is sufficient for a transferee from a trustee in bankruptcy to be registered as proprietor, without such trustee having first been registered[9].

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[1] 1 Prideaux, 821.
[2] Ante, pp. 267-269.
[3] Form 41.
[4] 1897 Act, sec. 16 (2).
[5] 1875 Act, sec. 39; Rules 138, 139.
[6] Ibid., sec. 41.
[7] Ibid., sec. 42.
[8] Rule 185.
[9] 1897 Act, sec. 9 (6); Rule 104.

Not only is provision made for the transfer of the entire interest of the registered owner by means of certain forms, such transferee being in his turn registered as owner, but provision is made also for the creation of mortgages, or charges, in certain forms[1], and for the registration thereof, and for a certificate of the charge being given to the mortgagee, or chargee[2]. It is provided that the chargee must be content with this certificate of charge, without having handed over to him the proprietor's land certificate, unless the contrary is agreed[3]. The chargee does not get the legal estate by virtue of his charge, but can pass it to a purchaser[4]. Words to pass the legal estate can be[5], and usually are, added to the charge, but the borrower remains the registered proprietor of the land. A mortgagee of leaseholds by registered charge, unless words are put in to pass the legal estate, occupies towards the lessor the position of a sub-lessee, and not of an assignee, and cannot be sued by the lessor for rents and on covenants in the lease. In every registered charge there are implied covenants by the registered proprietor: (1) To pay principal and interest[6]; and (2) If the property is leasehold, to pay rent, and to perform the covenants in the lease, and indemnify the chargee therefrom[7]. Power is conferred on the chargee, subject to any entry on the register to the contrary: (1) To enter on the lands, or into receipt of the rents and profits, to obtain payment of his money, subject to the rights of prior incumbrancers and to the liability attached to a mortgagee in possession[8]; (2) To enforce his security by sale, or forclosure, in similar manner to

Creation of mortgages or charges.

Implied covenants.

Implied powers.

Forms 44, 45, 46.
1875 Act, sec. 22.
[3] 1897 Act, sec. 8 (4); Rule 259 B.
[4] 1875 Act, sec. 27.
[5] Rule 97; *Capital & Counties Bank* v. *Rhodes* (1903), 1 Ch., 631.
[6] 1875 Act, sec. 23.
[7] Ibid., sec. 24.
[8] Ibid., sec. 25.

a mortgagee of unregistered land[1]; and (3) To exercise the statutory powers of sale, insurance, appointing a receiver, and cutting ripe timber, which are conferred on mortgagees by deed under sections 19 to 24 of the Conveyancing Act 1881[2]. But all these implied covenants and powers can be negatived or varied by the charge itself[3]. Subject to any entry on the register to the contrary, registered charges rank according to the order in which they are registered and not according to the order in which they are created[4].

Priorities.

Equitable mortgages.

A registered proprietor of any freehold or leasehold land or of a charge may, subject to any registered estates or interests, create a lien or charge thereon by deposit of the land certificate, or office copy of registered lease, or certificate of charge, which is to be equivalent to an equitable mortgage of unregistered land effected by a deposit of title deeds[5]. This equitable mortgage should be protected by a notice to be entered by the registrar in the Charges Register, which has all the effect of a caution under section 53 of the 1875 Act[6]. It will be observed that, as a person who has created a registered charge may (unless otherwise agreed) properly retain possession of his land certificate, he is thus able to still create an equitable mortgage by deposit of such land certificate, though, of course, such equitable security is subject to the prior registered charge. It is manifest, however, that in case of land registered with a possessory title, the equitable mortgagee should obtain the deeds as well as the land certificate, as otherwise he may not be

[1] 1875 Act, sec. 26.
[2] 1897 Act, sec. 9 (2).
[3] Rule 159.
[4] 1875 Act, sec. 28.
[5] 1897 Act, sec. 8 (6).
[6] Rule 243.

possessed of the necessary evidence of title should he have to take steps to enforce his security.

Unregistered mortgage.

Registered land can also be mortgaged by an ordinary unregistered mortgage deed; but this will need to be protected either by a caution, or restriction, or notice, entered on the register[1].

Transfers and discharges of charges.

Registered charges are properly transferred by registered transfers in a prescribed form[2]. On payment off of a registered charge, no reconveyance is necessary, but a discharge is made in a prescribed form, and signed by the registrar, who is, however, entitled to act upon any other proof of satisfaction of a charge that he may deem sufficient[3]. The fact of the charge having ceased to exist is duly entered on the register.

Foreclosure.

If the owner of a registered charge forecloses, he files in the registry an office copy of the foreclosure order absolute, and the certificate of charge, and (if he has it) the land certificate, and is thereupon entered as registered proprietor (subject to prior charges) of the land[4].

Unregistered dealings with registered land.

All conveyances and mortgages of registered land by the registered proprietor should, no doubt, be made in the registered forms, although in some cases it may be necessary or, at any rate, advisable to supplement the forms by other instruments, because of the impossibility of always making the forms comprise everything which is required. Notwithstanding this, there is, however, nothing to prevent dispositions being made by the registered proprietor quite outside the Acts; and a person having an interest in registered property, but not being

[1] 1875 Act, sec. 49.
[2] Rule 168.
[3] Rule 166.
[4] Rule 164.

himself the registered proprietor, can only deal with the property by unregistered dispositions[1]. It is provided that, subject to the maintenance of the estate and right of the registered proprietor, any person having a sufficient estate or interest in the land may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered, and any persons entitled to or interested in any unregistered estates, rights, interests, or equities, may protect the same from being impaired by any act of the registered proprietor, by entering cautions or inhibitions[1].

Registered proprietors granting leases.

There is no provision in the Acts or rules for the granting of registered leases by a registered proprietor, and they, therefore, are quite outside the Act, although the lessee, having once got his lease, can register that if it is of a sufficient term[2]. It will be borne in mind that leases not exceeding 21 years are not deemed incumbrances on land, and, therefore, no special provision with regard to them has been made, but, leaving them out of consideration, it is provided that a lessee for life or lives, or for more than 21 years, or where the occupation is not in accordance with such lease (*e.g.*, a term created to secure portions), may register a notice of such lease, and then every registered proprietor of the land, and every person deriving title through him, excepting proprietors of incumbrances registered prior to the registration of such notice, is affected with notice of such lease, as an incumbrance on the land[3].

Notice of lease.

Notice of dower or curtesy.

Another case in which, there being no possibility of the party interested registering, protection is afforded by a similar notice, is a tenant by the

[1] 1897 Act, sec. 49.
[2] Ante, p. 586.
[3] 1875 Act, secs. 50, 51; Rules 201-206.

curtesy or in dower[1]. We have already mentioned[2] that an equitable mortgage should be protected by a similar notice.

Entry of no survivorship.

To prevent frauds by a surviving trustee, it is provided that whenever persons are registered as joint proprietors of land or a charge, an entry may be made in the register that, when the number of proprietors is reduced to one, no disposition of the land or charge shall be registered except by order of the registrar or of the court[3].

All other unregistered dealings may be protected by means of cautions, inhibitions, or restrictions.

Caution.

A caution is a signed memorandum, or note, supported by an affidavit or statutory declaration of interest, and filed in the registry. It entitles the cautioner to 14 days' notice before there can be any dealing with the land by the registered proprietor. A caution may be voluntarily withdrawn, and is deemed withdrawn if nothing further is done by the cautioner within the 14 days[4]. If a person lodges a caution without good cause, he is liable to be ordered to pay damages in respect of it[5]. A caution may be used by any person who is not the registered proprietor, but has some estate, interest, right, or claim in respect of the property, *e.g.*, a judgment creditor who has seized the lands in execution under an elegit, or a person who has instituted an action in respect of the property. This being so, there appears now no need to ever register an action as a *lis pendens* in respect of registered land, as a caution takes its

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[1] 1875 Act, sec. 52 ; Rule 207.
[2] Ante, p. 600.
[3] 1875 Act, sec. 83 (3), as amended by Schedule 1 of 1897 Act ; Rules 224, 225.
[4] Ibid., secs. 53, 54 ; Rules 226-233.
[5] Ibid., sec. 56.

place, and certainly effects all that a *lis pendens* could effect were the land not registered. A *lis pendens*, therefore, is, apparently, of no use as regards registered land.

Inhibition.

An inhibition is an order forbidding any dealing with the land, either for a time, or until further order. The application for it must be with consent of the registered proprietor, or be supported by a statutory declaration and such other evidence as satisfies the registrar or Court[1]. A cautioner who has received notice should, if he wishes still to persevere with his objection, apply for an inhibition, or a person without first entering a caution can apply for an inhibition.

Restrictions.

A registered proprietor can apply to the registrar to place restrictions on any registered dealing, unless notice is sent to him by post, or some specified consent is obtained, or some other specified thing is done[2]. Thus, if a tenant for life is registered, there may be restrictions against selling the mansion house or as to payment of purchase money.

Cautions, inhibitions, and restrictions, and, in some cases, notices, are then the protections afforded to persons who have, or acquire, estates or interests of an unregistered nature in registered land. Certainly, as a rule and when possible, registered dispositions should be taken, and cautions and inhibitions only used where there can be no registration, *e.g.*, in the case of an equitable mortgage by deposit of a land certificate, or the assignment, or mortgage, of a beneficial interest vested in trustees who are the registered proprietors. Further, a caution may be used even before land is registered, so as to entitle a

Caution before land registered.

[1] 1875 Act, sec. 57; Rules 234-239.
[2] Ibid., secs. 58, 59; Rules 80, 240, 241.

person to notice should an application to register be made[1]. Very full provisions exist for searching the registers and ascertaining all registered dealings with the land, and all cautions, inhibitions, and notices[2]. The register is, for convenience, sub-divided into three sections: (1) The property register, the principal function of which is to give a description of the land; (2) The proprietorship register, the function of which is to shew what kind of title has been registered, and who may deal with the land by way of transfer, registered charge, or mortgage by deposit, and to disclose any cautions, inhibitions, or restrictions affecting his power of disposition; and (3) The charges register, the function of which is to disclose incumbrances, including notice of leases, curtesy, dower, and mortgages by deposit. The register is not open to public inspection[3].

The register.

[1] 1875 Act, secs. 60, 62; Rule 88.
[2] Rules 283-295.
[3] 1875 Act, sec. 104; Rule 14.

CHAPTER XVIII.

STAMPS, DEATH DUTIES, AND COSTS.

(1) Stamps.

Stamp Act 1891.

The subject of stamp duties, generally, is governed by the Stamp Act 1891[1], and under this statute, unless it is specially enacted otherwise, an instrument may be stamped either before or after execution. An agreement which requires only a sixpenny stamp must be stamped within 14 days of execution[2]. Conveyances, leases, mortgages, settlements, and all deeds generally, must be stamped within 30 days of execution, or, if executed abroad, within 30 days of arrival in the United Kingdom; or, if the duty has been assessed for the purposes of an adjudication stamp, then within 14 days of the assessment.

Effect of not stamping.

The mere fact that an instrument which ought to have been stamped has not been stamped within the proper time does not render it illegal or void, but it cannot be given in evidence until stamped, and, in any action, it is the duty of the proper officer of the Court to call the attention of the Court to any want or insufficiency of stamp[3]. In one case, however, the substantial validity of an instrument is affected by non-stamping, it being provided that the assignee of a life policy cannot give a valid receipt for the policy money unless the assignment is duly stamped[4].

Penalties.

If an instrument is not duly stamped, certain penalties are incurred, for, firstly, the instrument can only be stamped by paying a penalty of £10, and if the duty exceeds £10, 5 per

[1] 54 & 55 Vict., c. 39.
[2] This is a regulation of the Commissioners.
[3] Stamp Act 1891, sec. 15.
[4] Ibid., sec. 118.

cent. per annum on the duty, and, also, if the duty is only paid in Court, the further fee of £1; and, secondly, the person responsible for the omission to stamp is, in most cases, made liable to a personal penalty, or fine, of £10, and a further penalty equivalent to the stamp duty which ought to have been paid[1]. The Commissioners may, however, if they think fit, mitigate, or remit, any of these penalties[2], and this without any limit of time[3]. It is not proposed here in any way to attempt to deal with stamp duties generally, but simply to supply some of the most common and useful information as to stamps affecting conveyancing matters.

Agreements.

An ordinary agreement, with certain exceptions[4], requires a sixpenny stamp. But an agreement for a lease, for a term not exceeding 35 years, must be stamped as a lease[5]. And in the following cases also, *ad valorem* duty must be paid on an agreement, viz.: (1) Agreements for the sale of an equitable interest in property; (2) Agreements for the sale of any property, except land, or property locally situate out of the United Kingdom[6], or goods, or stock, or ships[7]. This is a practically important provision, and from it the following results ensue: (1) If A agrees to sell to B his unincumbered land, only a sixpenny stamp is required; (2) If A agrees to sell to B freeholds subject to a mortgage, *ad valorem* duty is payable; (3) If A agrees to sell to B his share under a trust, *ad valorem* duty must be paid; (4) If A agrees to sell to B the goodwill of his business, *ad valorem* duty must be paid; (5) If A agrees to sell

Stamp Act, 1891, sec. 59.

[1] Stamp Act 1891, sec. 14.
[2] Ibid., sec. 15.
[3] 58 & 59 Vict., c. 16, sec. 15.
[4] Indermaur's Common Law, 316.
[5] Stamp Act 1891, sec. 75.
[6] *Inland Revenue Commissioners* v. *Muller* (1901), A. C., 217; 70 L. J., K. B., 677; 84 L. T., 729.
[7] Stamp Act 1891, sec. 59.

to B, as a going concern for £20,000, freehold premises, the goodwill of the business carried on there, the stock-in-trade, certain patents, copyrights and trademarks, the benefit of existing contracts, and the book debts, the purchase money must be apportioned, and *ad valorem* duty must be paid on so much of it as is fairly applicable to the goodwill, patents, trademarks, copyrights, benefit of contracts, and the book debts. Such a point as this often occurs in the formation of a company, and the agreement is not allowed to be filed with the Registrar of Joint Stock Companies until the stamp duty has been assessed by the Commissioners, and duly paid, and the agreement impressed with an adjudication stamp[1]. If, however, an agreement, which requires to be stamped with *ad valorem* duty, is only stamped with a sixpenny stamp, the contract is, nevertheless, admissible in evidence for the mere purpose of proceedings to enforce specific performance or to recover damages for the breach thereof. Any subsequent conveyance, or transfer, made in pursuance of a contract bearing a sixpenny stamp, must be stamped with *ad valorem* duty within six months, and this being done both instruments are to be deemed duly stamped. Where the *ad valorem* duty is paid on the agreement, of course it is not again paid on the conveyance, but that is marked with a denoting stamp, to shew that the *ad valorem* duty was thus previously paid[2].

Conveyances.

A conveyance, transfer, or assignment of property, is stamped with an *ad valorem* duty of 10s. per cent., or, more accurately, 2s. 6d. for every £25, or fractional part thereof, of the consideration money up to £300, and then 5s. for every additional £50, or fractional part thereof. If a person buys property

[1] *West London Syndicate* v. *Inland Revenue Commissioners* (1898), 2 Q. B., 507 ; 67 L. J., Q. B., 956 ; 79 L. T., 289.
[2] Stamp Act 1891, sec. 59.

subject to a mortgage thereon, the mortgage money is treated as part of the consideration money[1]; thus A mortgages his house to B for £800, and then sells the equity of redemption to C for £200; here C pays *ad valorem* duty not on £200, but on £1000. If a person, having agreed to buy property, before the conveyance to himself agrees to sell it to another person to whom it is conveyed direct, only one *ad valorem* duty is paid, viz., on the amount the sub-purchaser is paying[2]. Thus A agrees to sell a house to B for £500, and B then agrees to sell it to C for £600, and it is conveyed direct by A to C; here *ad valorem* duty is payable on £600.

Foreclosure orders.

A foreclosure order, having the effect of a conveyance, requires to be stamped as such, but it is provided that the duty upon any such order shall not exceed the duty on a sum equal to the value of the property, and that where duty is thus paid upon the foreclosure order, any conveyance following thereon shall be exempt[3].

Mortgages, etc.

A legal mortgage is stamped with an *ad valorem* duty of 2s. 6d. per cent., or, more accurately, with 1s. 3d. for every £50, or fractional part thereof, up to £300, and then 2s. 6d. for every £100, or fractional part thereof. A collateral security is stamped with 6d. per cent., as also are transfers of mortgages, and reconveyances. If a further advance is made to the mortgagor on a transfer, then, as to the further advance, duty is paid as on a new mortgage. An equitable mortgage by signed writing is stamped at the rate of 1s. per cent.

Building Society mortgages.

Mortgages to building societies were formerly exempt from stamp duty[4]. There is, however,

[1] Stamp Act 1891, sec. 57.
[2] Ibid., sec. 58 (4); ante, p.
[3] 61 & 62 Vict., c. 10, sec.
[4] 6 & 7 Wm. IV., c. 32.

now no such general exemption, and, as a rule, mortgages to building societies must be stamped like other mortgages. If, however, the society is one not incorporated under the Building Societies Act 1874 (which is very rarely the case), the exemption still exists if the mortgage is for not more than £500[1]. Under the Building Societies Act 1874, a receipt under the seal of the society, countersigned by the secretary or manager, indorsed on a mortgage to the society—or if the mortgage is a registered charge under the Land Transfer Acts, an instrument of discharge[2] in the prescribed form, under the seal of the society (or if unincorporated, under the hands and seals of the trustees) and attested by the secretary—operates as a reconveyance, and is exempt from any duty[3].

Settlements

A settlement of money, or stock, whether for valuable consideration, or voluntary, requires to be stamped with an *ad valorem* duty of 5s. per cent. But where land is settled in trust for sale, and is thus constructively converted, the settlement is not liable to this duty, but, like any other settlement of land, is only liable to pay a ten shilling deed stamp[4]. A settlement of a policy of life assurance requires, usually, to be stamped with *ad valorem* duty; but if the settlement contains no covenant to keep up the policy, the duty is paid on the surrender value of the policy at the date of the settlement, and, if there is no surrender value, is simply a ten shilling deed stamp, while, if there is such a covenant, duty is paid on the amount assured[5].

Leases.

Leases, and also agreements for leases for a term not exceeding 35 years, require to be stamped with

[1] 37 & 38 Vict., c. 42, sec. 7; Stamp Act 1891, sec. 89.
[2] Land Transfer Rules, 166, 167; Form 48.
[3] 37 & 38 Vict., c. 42, secs. 41, 42.
[4] *Re Stucley* (1870), L. R., 5 Eq., 85; 39 L. J., Ex., 86.
[5] Stamp Act 1891, sec. 104.

an *ad valorem* duty, varying according to the length of the lease and the amount of the rent. If an agreement for a lease is so stamped, and afterwards a lease is granted in pursuance of such agreement, the lease only requires a sixpenny stamp, but it should also be stamped with a denoting stamp[1].

Deeds.

A deed or contract under seal, on which *ad valorem* duty is not payable, requires to be stamped with a ten shilling stamp. And every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion (except a sale or mortgage) is transferred to or vested in any person, is charged with duty as a conveyance or transfer of property[2]; but a signed assent of the executor to a devise does not require any stamp[3]. Thus, an appointment of a new trustee requires a ten shilling stamp; and a conveyance or transfer of property on such appointment[4], or on the retirement of a trustee[5], requires the same duty. A conveyance from the personal representative to the devisee or heir, and a conveyance for natural love and affection, each need a ten shilling stamp.

Conveyance or transfer.

Duplicate or counterpart

A duplicate or counterpart of any deed requires to be stamped with a five shilling stamp (if the duty is so much) and, in addition, it may be impressed with a denoting stamp.

Denoting stamp.

A denoting stamp is a stamp affixed to an instrument to shew that the duty payable in respect of the transaction has been paid on some other instrument. Thus, where an agreement for a lease, or for a sale, is stamped with the proper *ad valorem* duty, any

[1] Stamp Act 1891, sec. 75.
[2] Ibid., sec. 62.
[3] *Kemp* v. *Inland Revenue* (1905), 1 K. B., 581; 74 L. J., K. B., 112.
[4] Stamp Act 1891, sec. 62.
[5] 2 Edw. VII., c. 7, sec. 9.

subsequent lease, or conveyance, in pursuance of the agreement, may be stamped with a denoting stamp, to shew that the proper duty has been thus paid. Again, with regard to a lease and a counterpart, the lease bears the proper duty, and the counterpart is stamped with a five shilling stamp, and may also be impressed with a denoting stamp[1].

Adjudication stamp.

An adjudication stamp is a stamp affixed to any instrument where the amount of the stamp duty has been specially assessed by the Commissioners, and the instrument stamped in accordance with their decision. When thus stamped the instrument cannot afterwards be objected to on the ground of insufficiency of stamp. Such an assessment may be appealed against within 21 days, by means of a case stated for the opinion of the High Court[2]. It may sometimes happen that there is a doubt as to what is the proper stamp duty an instrument should bear, and by means of adjudication the point is settled. For the purposes of adjudication the Commissioners require the instrument in respect of which their decision is required to be produced, and a copy, or sufficient abstract thereof, and any necessary statement of facts, to be lodged with them. When the Commissioners give their decision, the instrument is stamped with the duty they have decided it should bear, and an adjudication stamp is also affixed.

(2) Death Duties.

Four death duties.

The duties that are payable to Government, according to circumstances, in respect of the devolution of property on death, are four, viz.: (1) Estate Duty (in place of the old Probate Duty, and, later on, Account Duty); (2) Settlement Estate Duty; (3) Succession Duty; (4) Legacy Duty.

[1] Stamp Act 1891, sec. 11.
[2] Ibid., secs. 12, 13.

1. Estate duty.

On what property payable.

The subject of estate duty is governed by the Finance Act 1894[1], as amended by the Finance Acts 1896[2], 1898[3], 1900[4], and 1907[5]. It is a duty payable on the whole net amount of property, whether real or personal, and whether settled or not settled, passing on a person's death taking place after 1st August, 1894[6]. Property "passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and the words "on the death" include "at a period only ascertainable by reference to the death[7]." For the purpose of estate duty, property passing on the death is deemed to include[8]—

(1) All property of which the deceased was at his death competent to dispose[9].

(2) Property in which the deceased or any other person had an interest ceasing on his death, to the extent to which a benefit accrues by the cesser of such interest.

(3) Any property taken as a *donatio mortis causâ*.

(4) Any property comprised in a voluntary gift[10] made within 12 months before the donor's death.

[1] 57 & 58 Vict., c. 30.
[2] 59 & 60 Vict., c. 28.
[3] 61 & 62 Vict., c. 10.
[4] 63 Vict., c. 7, secs. 11-14.
[5] 7 Edw. VII., c. 13, secs. 10-16.
[6] Finance Act 1894 (57 & 58 Vict., c. 30), sec. 1.
[7] 57 & 58 Vict., c. 30, sec. 22.
[8] Ibid., sec. 2; 44 & 45 Vict., c. 12, sec. 38; 52 & 53 Vict., c. 7, sec. 11.
[9] A person is deemed "competent to dispose" of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail whether in possession or not; and "general power" includes every power or authority enabling the donee or holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under the Settled Land Act 1882, or as mortgagee (57 & 58 Vict., c. 30, sec. 22).
[10] *E.g.*, a settlement on a child's marriage (*Attorney General* v. *Holden* (1903), 1 K. B., 832; 72 L. J., K. B., 420; *Attorney General* v. *Smyth* (1905), 2 Ir. R., 553).

(5) Any property taken under any gift, whenever made, of which *bonâ fide* possession and enjoyment was not assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor.

(6) Any property which the deceased, having been absolutely entitled thereto, has caused to be vested in himself and any other person, so that any beneficial interest therein passes by survivorship.

(7) Any property which passes under any settlement, or trust, not taking effect as a will, under which the settlor has a life interest, or power of revocation.

(8) Any money received under a policy on his life, which the deceased wholly, or partly, kept up for the benefit of a donee.

(9) Any annuity, or other interest, purchased or provided by the deceased, to the extent of the beneficial interest accruing by survivorship, or otherwise, on his death[1].

It will be observed that this provision is a very wide one, and is purposely framed to prevent attempts to evade estate duty by ingenious devices; and that estate duty is payable, not only in respect of property which a deceased person was entitled to dispose of, but also on property which passes to another by reason of his death. Thus A is entitled to £10,000, his own property, and he has a life interest in another £10,000, which, on his death, passes to B. Estate duty is payable on the whole £20,000.

Exemptions from estate duty.

Estate duty is, however, not payable on property situated out of the United Kingdom, provided that before the Act it would not have been liable to legacy or succession duty[2]. This includes all immoveable

[1] 57 & 58 Vict., c. 30, sec. 2; 44 & 45 Vict., c. 12, sec. 38; 52 & 53 Vict., c. 7, sec. 11.

[2] 57 & 58 Vict., c. 30, sec. 2.

property abroad; and also moveable property abroad if the deceased was domiciled out of the United Kingdom at the time of his death[1]. But if the will of a testator domiciled in England gives foreign realty to executors and trustees in England in trust to convert, estate duty is payable in England even though the trustees under a power in the will have not in fact converted, because the trust for sale converts the foreign realty into personalty in equity for fiscal as well as other purposes[2]. Negotiable instruments belonging to a foreigner domiciled abroad are liable to estate duty if they happen to be in England at the owner's death[3]. Estate duty is not payable on property held by the deceased as trustee, under a disposition not made by him, or made by him more than 12 months before his death, if possession was *bonâ fide* taken and retained to the exclusion of all benefit to the deceased[4]. Property falling in on death, but by reason of valuable consideration, is also exempted from liability to estate duty; thus A is a fee simple owner, and grants a lease at a rack rent to B for the life of C; when C dies B's interest ceases, and so a benefit may be said to accrue to A, but no estate duty is payable in respect of that[5]. Other exemptions from liability to estate duty are: a single annuity not exceeding £25, purchased by the deceased, or by the deceased and another for the life of himself and another, and the survivor of them; an unsold advowson;

Attorney General v. *Johnson.*

Winans v. *Regem.*

[1] Norman's Death Duties, 213. As regards debts secured on property abroad, it has been decided that the right being to the debts and not the property, they are liable to estate duty (*Attorney General* v. *Sudeley* (1896), 1 Q. B., 354; 65 L. J., Q. B., 281; 74 L. T., 91; *Lawson* v. *Inland Revenue Commissioners* (1896), 2 Ir. R., 418).

[2] *Forbes* v. *Steven* (1870), 39 L. J., Ch., 485; *Attorney General* v. *Ailesbury* (1887), 12 A. C., 672; *Attorney General* v. *Johnson* (1907), 2 K. B., 885; 76 L. J., K. B., 1150.

[3] *Winans* v. *Regem* (1908), 1 K. B., 1022; 77 L. J., K. B., 565; 98 L. T., 602; affirmed by House of Lords, W. N., 1909, p. 249.

[4] 57 & 58 Vict., c. 30, sec. 2.

[5] Ibid., sec. 3.

anything of national, scientific, or historic interest, given to any university or for national or municipal purposes; a pension or annuity payable by the Indian Government to the widow or child of a deceased officer[1]; and objects of national, scientific, or historic interest, settled to be enjoyed by different persons in succession, unless and until the same are sold[2]; estates of common seamen, marines, or soldiers dying in the service of the Crown[3]; personal property settled by a person who died before 2nd August, 1894, and on whose death probate or account duty was paid, unless the deceased was competent to dispose thereof at the date of his death or since the settlement[4]; reversionary interests *bonâ fide* sold or mortgaged for full value before 2nd August, 1894[5]; property settled before 2nd August, 1894, so that the survivor takes for life[6]. Provision is also made avoiding liability for estate duty in certain cases of enlargement of the estate of a settlor, and the reverter of property to a person who has made a disposition of it[7], the effect of which may, to some extent, be seen from the following illustrations: (1) On the marriage of his daughter, A settles property in trust for himself for life, and then for his daughter for life, and then for her children, and, in default of children, in trust for himself. The daughter predeceases A, and has had no children. No estate duty is here payable, by reason of the enlargement of A's interest that necessarily takes place. (2) A settles property on his son for life, and the son predeceases him. No estate duty is payable in respect of the reverter to A. The exemptions, and

[1] 57 & 58 Vict., c. 30, sec. 15.
[2] 59 & 60 Vict., c. 28, sec. 20.
[3] 57 & 58 Vict., c. 30, sec. 3 (1).
[4] Ibid., sec. 21 (1).
[5] Ibid., sec. 21 (3).
[6] Ibid., sec. 21 (5).
[7] 59 & 60 Vict., c. 28, secs. 14, 15.

partial exemptions, in respect of small estates will be dealt with presently.

Deductions allowed.

Estate duty is not payable upon the gross, but upon the net, estate after deducting funeral expenses, debts, and incumbrances. The following debts and incumbrances are not, however, allowed to be deducted, viz.: (1) Debts or incumbrances created by the deceased otherwise than *bonâ fide* for value; (2) Debts for which reimbursement can be got from others; (3) Debts due to persons abroad, unless the deceased's property abroad is insufficient to pay them[1].

Rate of duty.

The rate of estate duty is of a graduating nature, and in case of persons dying on or after 19th April, 1907, is now[2] levied at the following rates :—

If principal value of estate exceeds	And does not exceed	Rate per cent. of duty.
£100	£500	£1
500	1,000	2
1,000	10,000	3
10,000	25,000	4
25,000	50,000	4½
50,000	75,000	5
75,000	100,000	5½
100,000	150,000	6
150,000	250,000	7
250,000	500,000	8
500,000	750,000	9
750,000	one million	10
one million	1½ millions	£10 on one million and £11 on the excess
1½ millions	2 millions	£10 on one million and £12 on the excess
2 millions	2½ millions	£10 on one million and £13 on the excess
2½ millions	3 millions	£10 on one million and £14 on the excess
3 millions	—	£10 on one million and £15 on the excess.

[1] Finance Act 1894, sec. 7.
[2] Finance Act 1907, sec. 12.

Aggregation.

For the purpose of arriving at the rate of duty, all property "passing on a person's death" is to be aggregated, except: (1) Property in which the deceased never had any interest is treated as a separate estate[1]. Thus, if X had settled property on Y until A died, this property is treated as a separate estate on A's death. But if A dies possessed of £8000, and having had a life interest in £15,000, which goes over on his death; the whole is aggregated, and the rate of duty is throughout £4 per cent. This works hardly on the persons to whom he bequeaths his £8000, who have to pay £4 per cent. instead of £3 per cent., as would have been the case had he had no such life interest. (2) If the net value of the realty and personalty passing on the death (excluding property settled otherwise than by deceased's will) does not exceed £1000, the realty and personalty are not aggregated together or with the settled property, but each is treated as a separate estate[2]. (3) If the duty on a particular part of the property passing on the death is not leviable at once, that part is not aggregated[3].

Small estates

Special provisions are made with regard to duties on small estates: (1) Estates not exceeding £100 net pay no duty; (2) if the gross estate (excluding property settled otherwise than by the deceased's will) does not exceed £300, a fixed duty of £1 10s. is payable; (3) if the gross estate (excluding property settled otherwise than by the deceased's will) exceeds £300, but does not exceed £500, a fixed duty of £2 10s. is payable; (4) if the net value of property on which estate duty is payable (excluding property settled otherwise than by the deceased's will) does not exceed £1000, it is not to be aggregated

[1] 57 & 58 Vict., c. 30, sec. 4; 63 Vict., c. 7, sec. 12.
[2] 57 & 58 Vict., c. 30, sec. 16 (3).
[3] Ibid., sec. 21 (5).

with other property, but is to be deemed a separate estate, and there is no duty whatever payable in respect of it other than estate duty[1]. Thus, to illustrate this last provision: A dies possessed of a net estate of £800; duty will be payable at the rate of £2 per cent., but that will cover everything, and even if, in addition to his £800, he had a life interest in £20,000 which, on his death, passes over to another person, that will make no difference, for the £800 will be kept distinct, and not aggregated with it.

The value of an estate.

The value of property, for the purposes of estate duty, is arrived at by the Commissioners of Inland Revenue, on proper information, and valuations, estimating the price it would fetch in open market if sold at the time of the death of the deceased. But, as regards agricultural property, the value is not to exceed twenty-five times the annual amount as assessed to income tax, under Schedule A of the Income Tax Acts, after making proper deductions, including a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed[2].

Interests on expectancy.

Estate duty on interests in expectancy can be paid either (1) at once, in which case the expectancy is to be taken at its value at the death for the purpose of determining the rate of duty, or (2) when the expectancy falls into possession, in which case its actual value on falling into possession is to be added to the value of the rest of the estate for the purpose of determining the rate of duty[3].

Payment of estate duty.

The executor, or administrator, is to pay the estate duty on all personalty coming under his control

[1] 57 & 58 Vict., c. 30, sec. 16; 59 & 60 Vict., c. 28, sec. 17; 63 Vict., c. 7, sec. 18.

[2] 57 & 58 Vict., c. 30, sec. 7.

[3] Ibid., sec. 6 (7); *Re Eyre* (1907), 1 K. B., 331; 76 L. J., K. B., 227; 96 L. T., 236.

when he files the necessary Inland Revenue affidavit for the purposes of probate or administration. All other estate duty is to be paid upon an account to be delivered to the Inland Revenue Commissioners within six months of the death, by the person accountable. But the executor or administrator may also pay the estate duty on other property than personalty, which by deceased's will is under his control, or on request of the person accountable, on property not under his control. Estate duty on personalty is paid down; but on real property it may be paid by eight equal yearly, or sixteen half-yearly, instalments, with interest at £3 per cent. per annum (the first instalment to be paid twelve months after the death), but if the real property is sold, then the whole duty must be paid on completion of the sale[1]. Interest at £3 per cent. per annum is payable upon all estate duty from the date of the death of the deceased, or where the duty is payable by instalments or becomes due at any date later than six months after the death, from the date at which the first instalment of the duty becomes due[2].

Duty a charge on real property.

It is provided that a rateable part of the estate duty on an estate, in proportion to any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable, provided that the property shall not be so chargeable as against a *bonâ fide* purchaser thereof for valuable consideration without notice[3]. It, therefore, behoves a purchaser of real property, which has devolved on death, even if devised in trust for sale, to inquire as to the payment of the estate duty, and this is so notwithstanding that now, under Part I. of the Land Transfer Act 1897, realty devolves

[1] 57 & 58 Vict., c. 30, sec. 6.
[2] 59 & 60 Vict., c. 28, sec. 18.
[3] 57 & 58 Vict., c. 30, sec. 9.

upon an executor or administrator, *virtute officii*[1]. A person authorized or required to pay the estate duty on any property is empowered to raise the money to pay it, or to recoup himself after payment, by sale or mortgage of, or a terminable charge on, the property[2].

Limitation.

In dealing presently with succession duty, a provision will be noticed in the nature of limitation, which protects a purchaser after a certain time from any liability in respect of succession duty. The Finance Act 1894 provides that this shall apply also to estate duty[3].

Post, p. 626.

Questions under the Acts.

It can be well understood that many questions must arise as to how estate duty is to be borne between the beneficiaries, as to deductions that may be made for the purpose of arriving at the principal value of the estate, and as to whether estate duty is, or is not, payable. Some of the most important decisions may usefully be noticed.

The residuary estate bears estate duty on personalty.

The estate duty on all personalty is borne by the general personal estate, devolving on the personal representatives as such, and, therefore, the real sufferer in respect to it is the residuary legatee[4]; and this is so as regards personal estate which is appointed by deceased's will under a general power of appointment[5]. Realty does not naturally devolve on the personal representatives; and though it does now so devolve by virtue of Part I. of the Land Transfer Act 1897, this does not alter the previous position with

Re Hadley.

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[1] Land Transfer Act 1897, sec. 5; *Re Palmer, Palmer* v. *Rose-Innes*, W. N. (1900), p. 9.

[2] 57 & 58 Vict., c. 30, sec. 9 (4), (5), (6).

[3] Ibid., sec. 8 (2).

[4] *Re Webber, Gribble* v. *Webber* (1896), 1 Ch., 914; 65 L. J., Ch., 544; 74 L. T., 244.

[5] *Re Hadley, Johnson* v. *Hadley* (1909), 1 Ch., 20; 78 L. J., Ch., 254; 100 L. T., 54.

regard to duty[1]. If, therefore, a testator specifically bequeaths leasehold property to A, and bequeaths the residue of his estate to B, the proportionate part of the estate duty in respect of the leaseholds bequeathed to A is not borne by A, but by B, because it is paid out of the residue, which is thereby decreased to the detriment of B[2]. If, however, a testator specifically devises freehold property to A, and bequeaths the residue of his estate to B, the proportionate part of the estate duty in respect of the freeholds devised to A is borne by A, because, except for the Land Transfer Act 1897, they do not devolve on the executor as such, and, though that Act makes them so devolve, it has not altered this point[3]. If a will directs the executors to pay "testamentary expenses" out of a certain fund, this includes estate duty on all personalty[4], though not on realty[5]; but it does not include settlement estate duty on personalty[6].

Re Culverhouse.

Re Palmer.

Deductions.

It has been pointed out that estate duty is only payable on the net amount of the estate, after certain deductions, and though this appears plain enough, yet questions may arise. Thus, a father and son who were respectively equitable tenant for life, and equitable tenant in tail in remainder, of settled estates, executed a disentailing assurance, and then, in exercise of a joint power of appointment extending over the whole equitable interest, executed a mortgage of the equitable interest in fee to secure money advanced to the father and son, which they jointly, and severally, covenanted to repay. On the death of the father, the question arose whether the son was entitled to deduct from the principal

Earl Cowley v. *Inland Revenue Commissioners.*

[1] *Re Sharman* (1901), 2 Ch., 280; 70 L. J., Ch., 671; 84 L. T., 859.
[2] *Re Culverhouse, Cook* v. *Culverhouse* (1896), 2 Ch., 251; 65 L. J., Ch., 484; 74 L. T., 347.
[3] *Re Palmer, Palmer* v. *Rose-Innes*, W. N. (1900), p. 9.
[4] *Re Clemow* (1900), 2 Ch., 582; 69 L. J., Ch., 522; 82 L. T., 550.
[5] *Re Sharman* (1901), 2 Ch., 280; 70 L. T., Ch., 671; 84 L. T., 859.
[6] *Re King* (1904), 1 Ch., 363; 73 L. J., Ch., 210; 90 L. T., 281.

value of the property chargeable with estate duty the amount due under the mortgage. It was held that he was entitled to make the deduction[1]. But if a remainderman mortgages his remainder, he cannot deduct the mortgage debt when called on to pay estate duty on the tenant for life's death[2]; and the rule is the same although the tenant for life joined in the mortgage, if the loan was really to the remainderman only and he covenanted to indemnify the tenant for life against the liability for principal and interest[3].

Re Vernon.

Attorney General v. *Montagu.*

The question of what is a passing or devolution on death, so as to subject the property to estate duty, is occasionally by no means easy of determination, especially having reference to the various cases which are included in the Act of 1894, with the view of preventing evasions of the Act. In one case[4], a tenant for life surrendered his life estate to the remainderman, and then died, but after a year from the date of such surrender; yet it was argued that estate duty was payable on his death. The House of Lords, however, decided to the contrary, and it is difficult to see how any other decision could have been come to, seeing that the surrender extinguished the life interest, and that, therefore, there was nothing left to pass on death, and that the surrenderor lived more than a year. A later decision, to the effect that no estate duty is payable, although the surrenderor dies within a year[5], is over-ruled as to all deaths after March, 1900, by the Finance Act 1900[6].

As to property passing on death.

Attorney General v. *Beech.*

[1] *Earl Cowley* v. *Inland Revenue Commissioners* (1899), A. C., 198; 68 L. J., Q. B., 435; 80 L. T., 361; 47 W. R., 525.
[2] *Re Vernon* (1901), 1 K. B., 267; 71 L. J., K. B., 202; 83 L. T., 535.
[3] *Attorney General* v. *Montagu* (1904), A. C., 316; 73 L. J., K. B., 707; 90 L. T., 726.
[4] *Attorney General* v. *Beech* (1899), A. C., 53; 68 L. J., Q. B., 130; 79 L. T., 565; 47 W. R., 257.
[5] *Attorney General* v. *De Preville* (1900), 1 Q. B., 223; 69 L. J., Q. B., 283; 81 L. T., 690; 48 W. R., 193.
[6] 63 Vict., c. 7, sec. 11.

Estate duty payable twice.

Beyond these points, questions may sometimes arise whether estate duty is not payable twice, by reason of there being practically two devolutions.

Re Scott.

Thus, A devised land to his son B. B predeceased A, leaving a child living at A's death, so that there was no lapse[1]. On the death of A, it was held that estate duty was payable twice, once by reason of the technical devolution on B, and then again on the devolution occasioned by the 33rd section of the Wills Act 1837, in preventing a lapse, and rendering the position the same as if B had, in fact, survived A[2].

2. Settlement Estate Duty.

Settlement estate duty is also a duty governed by the same statutes as estate duty. It is an additional duty at a fixed rate of £1 per cent., payable on property which is settled, either by a deceased person's will, or by some other disposition, so as to pass on the deceased's death to some person not competent to dispose of it, unless the only life interest after the deceased's death is that of the deceased's wife or husband. The duty is, however, payable only once during the continuance of the settlement[3]. The question arose whether this settlement estate duty should be borne, like the estate duty, by the general estate, or by the particular property thus settled, and it was decided that it must be borne by the general estate[4] unless the deceased had covenanted to pay the money to the settlement trustees without any deduction[5]. However, the Finance Act 1896 now enacts that, on all deaths after 1st July, 1896, the settlement estate duty on a legacy or other personal property settled by the deceased's will must be paid out of such legacy or

Re Webber.

Finance Act 1896, sec. 19.

[1] Ante, p. 566.
[2] *Re Scott* (1901), 1 K. B., 228; 70 L. J., K. B., 66; 83 L. T., 613.
[3] Finance Act 1894, secs. 5. 17.
[4] *Re Webber, Gribble* v. *Webber* (1896), 1 Ch., 914; 65 L. J., Ch., 544; 74 L. T., 244.
[5] *Re Maryon-Wilson* (1900), 1 Ch., 565; 82 L. T., 171; 48 W. R., 338.

property unless the will contains an express provision to the contrary[1].

Questions as to when payable.

It is not always easy to determine when property is to be deemed to be settled, so as to be subject to this extra duty. Thus, in one case, a testatrix bequeathed certain annuities for life, and directed that there should be set aside, in the names of her trustees, sufficient capital sums to produce the annuities, and that, until such sums were set aside, the annuities should be paid out of the income, or, in default thereof, out of the capital of her residuary estate, and, subject as aforesaid, she devised and bequeathed her residuary estate to certain other persons. It was held that so much of the testatrix's residuary estate as was required and set aside to produce the annuities was "settled" property, and, consequently, settlement estate duty was leviable in respect thereof[2]. In another case, a testator specifically devised and bequeathed property to A for life, and then as A should by will appoint, and it was held that settlement estate duty was payable in respect of this property[3].

Attorney General v. *Owen.*

3. Succession Duty.

Succession duty is governed mainly by the Succession Duty Act 1853[4]. It is a duty payable on any devolution of real or leasehold property, legacies charged on realty, and settled personal property, by reason of a death occurring on or after 19th of May, 1853[5]. It is payable by the individual successor, and is at a varying rate according to the degree of relationship between the successor and the predecessor from whom he takes, the Act laying down

[1] 59 & 60 Vict., c. 28, sec. 19.
[2] *Attorney General* v. *Owen* (1899), 2 Q. B., 253; 68 L. J., Q. B., 779; 81 L. T., 126.
[3] *Re Palmer, Palmer* v. *Rose-Innes*, W. N. (1900), p. 9.
[4] 16 & 17 Vict., c. 51.
[5] Ibid., secs. 2, 18, 54.

Rates of duty

the following rates: 1 per cent. for lineals; 3 per cent. for brothers or sisters of the predecessor, or their descendants; 5 per cent. for brothers or sisters of the father or mother of the predecessor, or their descendants; 6 per cent. for brothers or sisters of the grandfather or grandmother of the predecessor, or their descendants; 10 per cent. for successors of a remoter degree, or strangers in blood[1]. The Finance Act 1894[2] has, however, now abolished the 1 per cent. duty in any case where estate duty is paid; and the provisions made by that Act as regards small estates must also be borne in mind[3]. No succession duty is payable in respect of property the aggregate principal value of which is under £100[4]; nor is duty payable on a succession from a wife to a husband, or from a husband to a wife.

A charge, but barred by lapse of time.

Succession duty is made a first charge on the property[5], and, therefore, it behoves a purchaser of real or leasehold property, which has devolved on death, to inquire as to whether this duty has been paid. It is, however, provided that the claim of the Crown to succession duty cannot be enforced against a purchaser or mortgagee—after the lapse of six years from notice to the Commissioners of the fact that the succession duty has accrued, or from the date of the payment of the first instalment of the duty; or, in the absence of any such notice or payment, after the expiration of 12 years from the happening of the event which gave rise to an immediate claim for duty, or, if such period expired within six years from 31st May, 1889, then after the expiration of six years from that date[6].

Revenue Act 1889, sec. 12.

[1] 16 & 17 Vict., c. 51, sec. 10.
[2] 57 & 58 Vict., c. 30, sec. 1.
[3] Ibid., sec. 16; ante, p. 618.
[4] 16 & 17 Vict., c. 51, sec. 18.
[5] Ibid., sec. 42.
[6] 52 Vict., c. 7, sec. 12.

Value of succession.

It was provided by the Succession Duty Act 1853[1] that the interest of every successor to real or leasehold property should be considered to be of the value of an annuity equal to the net annual value of such property during his life, or any less period that he was entitled thereto, and such value was to be ascertained by reference to tables of value given in the Act, so that the value of a succession depended on the age of the successor. This is still the law where a successor is not "competent to dispose" of the property; but if he is "competent to dispose" (see ante, p. 613*n*), it is now provided by the Finance Act 1894[2], that the value of the succession shall be the principal value of the property after deducting the estate duty thereon. Thus if A succeeds to a life interest in land, to arrive at the value of his succession it is necessary to inquire into the net income of the property, and the age of A, and he pays succession duty on whatever sum it would cost to purchase a Government Annuity for his life for an amount equal to such net income. If, however, A succeeds to the fee simple or fee tail, or to a life estate with power to appoint, the actual saleable value has to be ascertained, and he pays succession duty on that without reference to his age.

Payment of succession duty.

Succession duty may be paid down, or by certain instalments. Under the Succession Duty Act 1853[3], it might be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of 12 months after succeeding to the property, thus allowing four years for payment. The Revenue Act 1888[4], however, provided that the duty might be paid by two equal moieties, whereof the first moiety should be paid by four equal yearly instalments, and

[1] 16 & 17 Vict., c. 51, sec. 21.
[2] 57 & 58 Vict., c. 30, sec. 18.
[3] 16 & 17 Vict., c. 51, sec. 21.
[4] 51 Vict., c. 8, sec. 22.

the second moiety on the day for payment of the last instalment of the first moiety, or by four further equal yearly instalments, thus extending the period of complete payment, if so desired, to eight years, instead of four years.

Death of successor before payment of all instalments.

The Succession Duty Act 1853[1] provides that if a successor, paying the duty by instalments, dies before the expiration of the period allowed for their payment, then, if he is competent to dispose of the property by his will, the remaining instalments shall, nevertheless, continue to be payable. This provision governs all absolute successions now. The same section, however, goes on to provide that if the successor shall not be so competent to dispose of the property, any instalments not due at his decease shall cease to be payable. Now the Revenue Act 1888[2] extends the periods for the instalments to eight years instead of four years, if so desired, but it was not likely that this extension would be allowed to operate to the prejudice of the revenue, and this 1888 Act goes on to provide[3] that, if the successor dies after the four years, all remaining instalments shall be payable; and if he dies within the four years, then so much shall cease to be payable as would have been the case had the payments been made in the manner originally provided. Thus we see a leniency shewn to a successor, by allowing him an extended time within which to pay the duty, but, at the same time, we perceive care taken that this leniency shall not operate to the prejudice of the revenue.

Timber.

Where a person succeeds to an estate with timber thereon, it would be manifestly unjust to make him pay duty on the value of the timber unless he cuts it.

[1] 16 & 17 Vict., c. 51, sec. 21.
[2] 51 Vict., c. 8, sec. 22.
[3] Ibid., sec. 22 (3).

It is, therefore, provided that duty shall only be paid on the value of timber when cut, an account being passed every year when it is cut, unless the value of the timber cut in any one year does not amount to £10, when no duty is payable thereon[1].

Advowson.

A successor to an advowson does not pay duty thereon unless he sells it[2].

Transmitted successions.

It is possible that the interest of a successor to property may be transmitted, by reason of his death, to another person before it falls into possession. As regards real property, and leaseholds, there was no necessity for any special provision with regard to this point, as the interest of a successor to such property being valued as an annuity commencing at the date of his becoming entitled in possession, and continuing payable during the residue of his life, it follows that the interest of such a successor who never becomes entitled in possession is of no taxable value, and neither he, nor any other person, can be liable to pay duty in respect of it. With regard to purely personal property, however, it is different. If, then, there were no special provision on the subject, there might be an accumulation of duties. Thus, £10,000 is given to trustees in trust for A for life and then to B. B dies during A's lifetime, and his interest devolves, say, on C. Were there no special provision, two duties would here be payable. The Succession Duty Act 1853[3], therefore, provides that where the interest of any successor in any purely personal property shall, before he shall have become entitled thereto in possession, have passed, by reason of death, to any other successor, then one duty only shall be paid in respect of such interest, but it shall be at the

[1] 16 & 17 Vict., c. 51, sec. 23.
[2] Ibid., sec. 24.
[3] Ibid., sec. 14.

highest rate which, if each such successor had been subject to duty, would have been payable by any one of them. Thus, in the example given above, suppose B was a brother of the testator, and C a stranger in blood, there would not be two duties payable, viz., one at 3 per cent. and another at 10 per cent., but one duty only, at the rate, however, of 10 per cent.

Accelerated successions.

A person may, by his own act, accelerate his succession to property, by buying up a prior interest. Thus, land may be devised to A for life, and then to B, and B will not pay any duty till A dies. Suppose, however, B buys up A's life interest, and we find B's succession accelerated by his own act. Were there no provision on the subject, it seems evident that B must at once pay succession duty, but the Succession Duty Act 1853[1] provides that in the case of such an accelerated succession the duty shall be payable at the same time, and in the same manner, as if no such acceleration had taken place.

4. Legacy Duty.

Legacy duty is governed by the Legacy Duty Acts[2]. It is a duty payable by each individual legatee, or next-of-kin, upon personal property which comes to him under a will or intestacy; but it is not payable in respect of leaseholds or legacies payable out of realty, as they are subject instead to succession duty. The rates of duty are the same as already detailed with regard to successions, and lineals pay no legacy duty, nor does a husband, or a wife. Plate, furniture, and other things not yielding income are not liable to either legacy or succession duty while enjoyed by persons who have no right to dispose of them. The provisions of the Finance Act 1894[3] with regard to small estates must here also be borne in mind.

[1] 16 & 17 Vict., c. 51, sec. 15.
[2] 36 Geo. III., c. 52; 55 Geo. III., c. 182.
[3] Ante, p. 618.

Legacy duty when legacy given to persons in succession.

Legacy duty is payable on the principal amount of the legacy. Where, however, a legacy is given to persons in succession, there is sometimes, necessarily, a difference to be observed. If a legacy is given to trustees upon trust to pay the income to A for life, and then absolutely to B, and A and B are both in the same degree of relationship to the testator, the duty is at once paid, and there is but one duty, A suffering by a consequent diminution of income, and B by a consequent reduction of capital. If, however, A and B are not of the same degree of relationship, then it is different; A's life interest is valued in the same way as on a succession to land[1], and he pays duty on that, and then at A's death B pays legacy duty on the corpus[2]. Should B be dead before his interest falls into possession, and his succession thus transmitted, there are not two duties payable, but only one, the duty being, however, at the higher rate[3].

Summary of different duties.

It will be seen, therefore, that on death there will, as a rule, always be one death duty payable, viz., estate duty; that there may also possibly be, in addition, settlement estate duty, and either legacy or succession duty. The whole of the estate duty, except as regards real property, is borne by the general estate; but, as regards real property, it is borne proportionately by the real estate. The settlement estate duty is borne by the particular property. And the legacy or succession duty is borne by th individual legatee or successor, unless, indeed, th testator's will contains a direction to the contrary.

Necessity of knowledge as to death duties.

An understanding of the subject of the death duties is, manifestly, necessary to a conveyancer, for, as we have seen, estate duty, settlement estate duty, and

[1] Ante, p. 627, and 16 & 17 Vict., c. 51, sec. 32.
[2] Norman's Death Duties, 32, 33.
[3] Ante, pp. 629, 630.

succession duty, form charges on land, and it is necessary to determine whether they, or any of them, have become payable, and, if so, whether the obligation has been discharged, or is barred by lapse of time.

(3) Costs.

Former remuneration of solicitors.

Until quite modern times, a solicitor has been remunerated for all matters of business, by reference to the length of time he was engaged, and the length of the documents which he prepared. The Solicitors Act 1870[1], however, allowed a solicitor to enter into an agreement with his client as to his remuneration, but such agreement was required to be in writing, and, if it related to litigious matters, no sum was to be received under it until it had been approved by a taxing master. All such agreements were to be enforced by motion to the Court in a summary manner[2]. These provisions are still in force as regards litigious business, but have no application to conveyancing business, a subject which is governed by the Solicitors Remuneration Act 1881[3].

Solicitors Remuneration Act 1881.

The Solicitors Remuneration Act 1881 was, it will be observed, passed in the same session as the Conveyancing Act 1881, and, having reference to the shortening of many legal instruments that was effected by that Statute, it is not to be wondered at that some new scheme of remuneration of solicitors should have been devised. This Act, therefore, provides that General Orders may from time to time be made, for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and

[1] 33 & 34 Vict., c. 28, sec. 1.
[2] Ibid., sec. 8.
[3] 44 & 45 Vict., c. 44, sec. 9.

other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business[1]. It, however, further provides that with respect to any business of the foregoing nature, it shall be competent for solicitors and clients to make agreements as to remuneration, such agreements being in writing, signed by the person to be bound thereby, or by his agent in that behalf, and that such agreements may be sued on in the ordinary manner[2].

General Order as to remuneration

In pursuance of this Act, a General Order was made, which came into effect on 1st January, 1883, and it is necessary to look to that to see how a solicitor is, in general, remunerated in most matters of a conveyancing nature. The Order has two schedules. Schedule I., Part 1, regulates the costs for sales, purchases, and mortgages; and Part 2 those for leases and agreements for leases, except mining leases. Schedule II. regulates costs for other business of a conveyancing nature, and costs for uncompleted matters which, if completed, would fall under Schedule I. It would be out of place, in a work like the present, to set out the Order in detail, and to discuss it, as a thorough understanding of costs is a matter requiring considerable study as a separate topic, and one which, in its details, is of more importance to the practitioner than the student. It seems, however, advisable to explain briefly the nature of the scheme of remuneration now existing.

The scheme.

The scheme is that a solicitor shall be remunerated on a sliding scale, according to the amount of the

[1] 44 & 45 Vict., c. 44, sec. 2.
[2] Ibid., sec. 8.

consideration money involved in each particular transaction. In sales, purchases, and mortgage transactions, a solicitor is entitled to charge £1 10s. per cent. up to £1000, whether acting for vendor, purchaser, mortgagor, or mortgagee. After the first £1000, and so on, the amount per cent. is reduced. This remuneration is for the strictly legal work of deducing title, or investigating title, as the case may be, and for completing the matter. If the solicitor also negotiates the particular transaction, he is entitled to charge a further £1 per cent. as a negotiating fee, up to £1000, the amount of this charge being reduced in similar manner, according to the magnitude of the transaction. Thus, on a mortgage or sale for £1000, a solicitor acting for a mortgagor or mortgagee, vendor or purchaser, is entitled at any rate to charge £15, and if the transaction was negotiated through him, he is entitled to charge £25. In addition, he is entitled to charge all further disbursements for stamps, counsel's fees, auctioneer's charges, travelling expenses, etc.

Negotiating fee.

When negotiation fee payable.

The fee for negotiating cannot be charged where any commission is paid to an auctioneer or agent. Thus, if a solicitor, on the instructions of his client, puts property up for sale by auction, and it fetches £1000, he can only charge the £1 10s. scale fee, and not also the £1 negotiating scale fee, because the auctioneer is paid commission. It has, however, been held that the solicitor can make his ordinary charges for work done up to the time of the sale[1].

Parker v. *Blenkhorn.*

Details of General Order

The General Order contains many details, and amongst them may be mentioned the following points as being of special importance. Where a

[1] *Parker* v. *Blenkhorn*, 14 A. C., 1; 58 L. J., Q. B., 209; 59 L. T., 906.

solicitor is concerned for both mortgagor and mortgagee, he is entitled to charge the mortgagee's solicitor's charges, and one-half of those which would be allowed to the mortgagor's solicitor up to £5000, and on any excess above £5000, one-fourth thereof. Where a conveyance and a mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only one-half of the fees for investigating the title and preparing the mortgage deed, up to £5000, and on any excess above £5000 one-fourth thereof, in addition to his full charge upon the purchase money, and his commission (if any) for negotiating. Where the prescribed remuneration would amount to less than £5, the remuneration is to be £5, except on transactions under £100, in which case the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be £3[1].

Leases.

The principle is exactly the same with regard to leases, the amount of the remuneration being based on the rent. In ordinary leases, where the rent does not exceed £100, the lessor's solicitor is entitled to charge £7 10s. per cent. on the rental, but in any case not less that £5, this to include the preparing, settling and completing the lease and counterpart, and the scale of remuneration is again gradually decreased as the rent increases. As regards building leases, and some other transactions of a like nature, there is a separate scale, the smallest amount of remuneration being £5. The lessee's solicitor is entitled to charge one-half of the amount payable to the lessor's solicitor, for perusing the draft lease and completing.

[1] Attention may here be drawn to *Re Longbotham* (1904), 2 Ch., 152; 73 L. J., Ch., 681; 90 L. T., 801; in which the Court of Appeal held that when a mortgagor obtains the common order to tax the mortgagee's costs under section 38 of the Solicitors Act 1843, the mortgagee is only to be allowed such solicitor and client costs as were incurred by him strictly in the character of mortgagee.

Special exertions.

Although the scale is, as a rule, a hard and fast one, it should be noticed that it is possible that, in exceptional cases, a larger amount of remuneration may be allowed. It is provided that, in respect of any business which is required to be, and is, by special exertion, carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration, for the special exertion, according to the circumstances.

Limit of the scale system.

This scale system only applies to transactions in the nature of sales, purchases, mortgages, and leases, so that there are many matters to which it does not apply, *e.g.*, partnership deeds, wills, settlements, transfers of mortgages, further charges, reconveyances, mining leases, agreements (other than agreements for leases), and a great variety of other business. Where the scale does not apply, a solicitor is entitled to charge in the same way as theretofore, except that by Schedule II. of the Order somewhat increased charges are in some respects allowed to what was formerly the case. Thus for drawing a document a solicitor is entitled to charge 2s. a folio (72 words); for engrossing it, 8d. a folio; for perusing documents, 1s. a folio; and for attendances 10s., subject to increase, or decrease, at the discretion of the taxing master. In addition, it is provided that in all cases to which the scale system of Schedule I. applies, a solicitor may, before undertaking any business, by writing under his hand, communicated to his client, elect that his remuneration shall be according to the old system, as altered by Schedule II., in which case he makes out a bill of costs in the ordinary manner[1].

Notice of election.

[1] See further, as to the position of solicitor and client, delivery of bill, etc., Indermaur's Common Law, 11th edition, 224-229.

Costs under Land Transfer Acts 1875 and 1897

Costs in connection with titles registered under the Land Transfer Acts 1875 and 1897 are governed by Rule 336. Certain additional charges are allowed to be made for first registration, beyond the ordinary costs, the same being according to a graduating scale, which, in the case of a possessory title, commences at 10s. 6d. per £100 on transactions not exceeding £1000, and is thereafter on a sliding scale. When a title has been placed on the register, then, if a title outside the register is given, the charges are the same as in dealings with unregistered land, except that Schedule I., Part 1, of the Solicitors Remuneration Order is excluded, and the charges are regulated by Schedule II. If, however, only the registered title is given, then the scale of remuneration is the same as on first registration with a possessory title; but the right to any negotiating fee remains as before. The practical result is that, at present, registration increases conveyancing costs, but in course of time it will materially decrease the costs in many cases. It is, however, provided that a solicitor may, before undertaking the business, by writing under his hand, communicated to his client, elect that his remuneration shall be by ordinary charges, irrespective of any scale[1].

Notice of election.

[1] Land Transfer Rule 336, and Schedule II. to the Rules.

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